SUPREME COURT, U. S.

MAY 15 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1709

JOHN R. HENRY, JR.,
Respondent,

v.

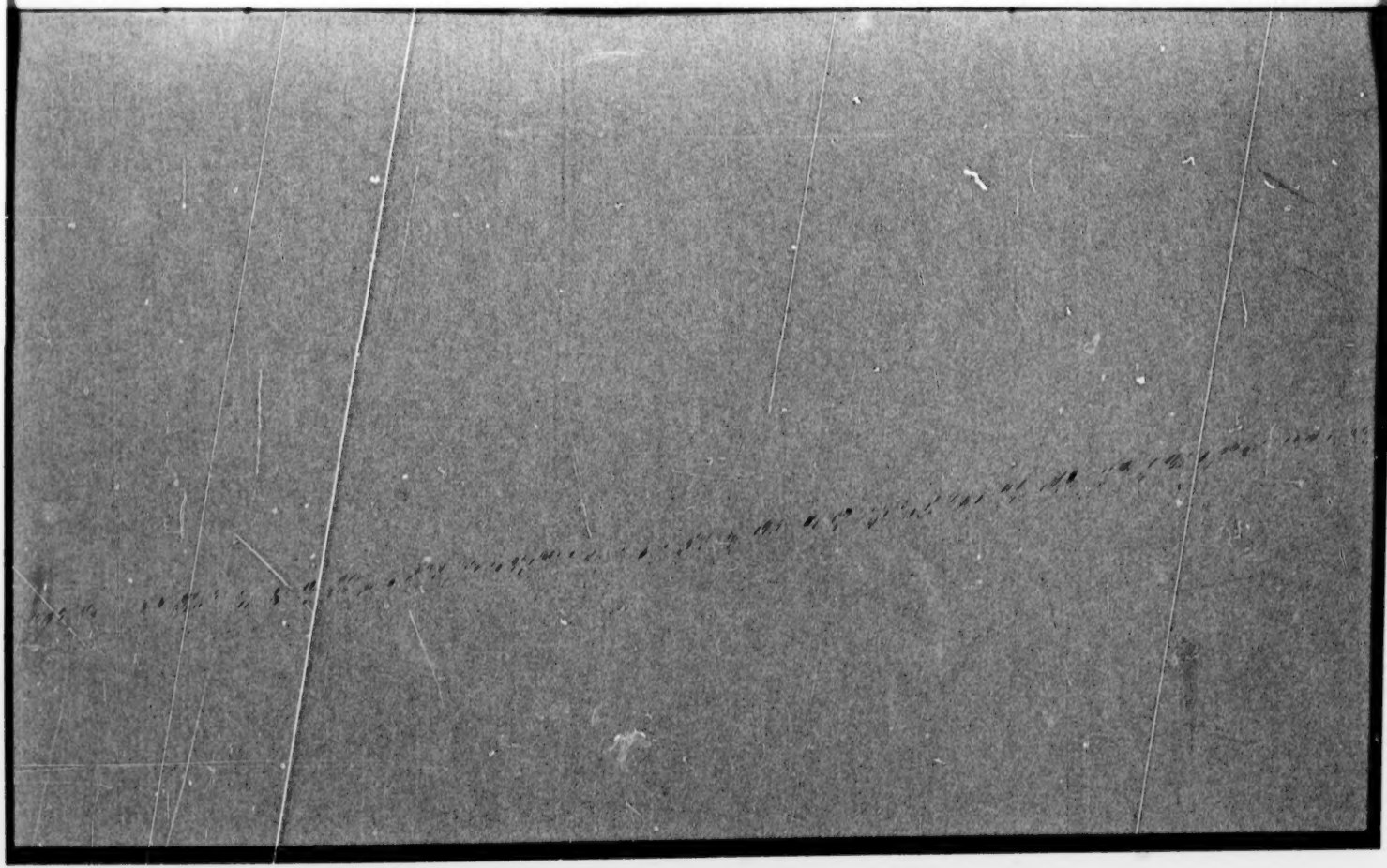
AMALIE SNEIDERS, and AMALIE SNEIDERS
as personal representative of the Estate of
MAKSIS SNEIDERS, deceased,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No. .....

JOHN R. HENRY, JR.,

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v.

AMALIE SNEIDERS, and AMALIE SNEIDERS as personal representative of the Estate of MAKSIS SNEIDERS, deceased,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Amalie Sneiders, in both her individual and representive capacities, respectfully prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit rendered on the 11th day of January, 1974, sustaining a judgment entered in the United States District Court for the Western District of Washington upon an order of default entered as punishment for petitioner's good faith assertion of her Fifth Amendment right to refuse to produce potentially incriminating private, personal records for inspection.

OPINION BELOW

The opinion of the Court of Appeals is reported at 490 F.2d 315, and reproduced as Appendix A hereto. The per-

tinent portion of that opinion, which petitioner asks this court to review, is contained in the following three sentences disposing of petitioner's right to assert her Fifth Amendment privilege:

> "Under an agreement between the prosecutor and appellant's husband, the records were handed to the postal authorities in connection with the criminal proceedings. Therefore, even if the records were incriminating, their disclosure in the civil case would not tend to incriminate the defendant. Any incriminating information was already in the hands of the prosecuting authorities."[1]

JURISDICTION

(i) The date of the Court of Appeals decision was January 11, 1974.

(ii) A petition for rehearing was duly served and filed on January 24, 1974. The petition for rehearing was denied on February 19, 1974. Copy of said order denying petition for rehearing is set forth as Appendix B hereto. May 20, 1974 is the 90th day following February 19, 1974.

(iii) The statutory provisions relied upon to confer jurisdiction on this court are as follows:

The initial action commenced in the United States District Court was based upon diversity of citizenship pursuant to 28 USCA 1332. The appeal to the Court of Appeals was made pursuant to 28 USCA 1294. The jurisdiction of this court is invoked pursuant to 28 USCA 1254.

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1. The characterization of the status of the records as being "in the hands of the prosecuting authorities", is an inaccurate statement, not supported by the record or argument, either oral or written. The records were and still are in petitioner's possession. Unfortuately, the head note editor for West Publishing Company states in the syllabus that the records were in the "possession" of the prosecuting authorities, which is not a fact.

QUESTIONS PRESENTED

1. Whether petitioner, as defendant in a civil case, who in good faith invoked her Fifth Amendment privilege against self-incrimination by refusing to produce her potentially incriminating personal private records for inspection upon request pursuant to Fed. R. Civ. P. No. 34 and who is thereafter adjudged in contempt for such refusal and as punishment therefor her pleadings stricken and an order of default against her, is thereby deprived of the rights guaranteed by the Fifth Amendment.

2. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a request to produce for inspection potentially incriminating personal private records that have been previously displayed to prosecuting authorities in plea bargaining negotiations in a parallel criminal action under an agreement that (1) such disclosure be without prejudice to petitioner later claiming her Constitutional rights, and (2) the prosecuting authorities would not disclose the contents of the records to the plaintiff.

3. Does the striking of petitioner's pleadings and the entry of a default as punishment for contempt for refusing to produce her potentially incriminating, private, personal records, under a good faith claim of constitutional privilege, render the assertion of the Fifth Amendment privilege "costly" in violation of the decisions of this court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied)

2. Federal Rule of Civil Procedure No. 26, Subsection (b)(1):

"(b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

"(1) IN GENERAL. Parties may obtain discovery regarding any matter, *not privileged,* which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the parties seeking discovery or to the claim or defense of any other party, including the existance, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (Emphasis supplied)

3. Federal Rule of Civil Procedure No. 34 is set out in full as Appendix C.

4. Federal Rule of Civil Procedure No. 37 is set out in full as Appendix D.

STATEMENT OF THE CASE

John R. Henry Jr., hereafter referred to as Henry, instituted an action on April 28, 1970, in the United States

District Court for the Western District of Washington as Cause No. 8913 against petitioner, Amalie Sneiders, hereinafter referred to as Sneiders, and her now deceased husband, Maksis Sneiders.

The complaint alleged that Sneiders had obtained the sum of $71,242.68 from Henry by fraud, in that Henry had purchased rare stamps from Sneiders for that amount upon the representation by Sneiders that such stamps were genuine, when in fact the stamps were worthless forgeries. Henry also alleged that the stamps would have been worth three times the price he paid had they been as represented, and prayed for the loss of his bargain.

At the same time, Henry obtained a Writ of Attachment upon posting a bond in the amount of $75,000.00 and filing an affidavit, which stated in part:

> "The damages for which the action is brought are for injury arising from the commission of a felony."

A few months later, Sneiders discovered Henry had been instrumental in prevailing upon the United States Attorney to consider presenting an indictment to the Grand Jury charging them with several felony counts for mail fraud under 18 USCA 1341 and 1342 based on some of the same allegations as in the Henry civil action. Sneiders personally, and through their attorney, entered into plea-bargaining negotiations with the United States Attorney in an effort to convince him that he could not possibly obtain a conviction. By that time, Sneiders had determined through discovery proceedings that Henry had no record or knowledge of what he had ordered from Sneiders and was therefore incapable of testifying that the stamps he received were not in fact stamps he ordered, it being con-

ceded that Henry had ordered many forgeries and facsimilies as well as genuine stamps. To make these plea-bargaining negotiations meaningful, it was necessary for Sneiders to allow the United States Attorney to inspect the orders actually submitted by Henry to Sneiders. Before that inspection took place, an agreement was entered into between the United States Attorney and Sneiders to the effect that such inspection was without prejudice to Sneiders' right to claim their constitutional privileges. The United States Attorney also agreed that he would not reveal the contents of the Sneiders' private records to Henry. See Appendix E, affidavit of Amalie Sneiders dated September 15, 1971, which is the only evidence ever presented to the United States District Court relating to the agreement. No contradicting evidence of any kind was ever presented, or suggested.

The plea-bargaining negotiations failed and the petitioner and her husband were indicted. Thereafter, a request was made by Henry in the civil action pursuant to Federal Rule of Civil Procedure No. 34 for production of the Sneiders' personal private records showing the orders received and the merchandise furnished in response thereto. Sneiders refused to produce such personal private records claiming privilege against self-incrimination pursuant to the Fifth Amendment. Maksis Sneiders died on May 24, 1971, while this matter was pending. The United States Attorney dismissed the indictment against petitioner, on June 16, 1971. However, said dismissal was without prejudice and the statute of limitations for the charges in the indictment has not yet expired. Since the United States Attorney had sufficient evidence to obtain an indictment against petitioner in the first instance it is reasonable to

assume she could be reindicted any day the Grand Jury happens to be in session. All the factors upon which the United States Attorney decided to dismiss the indictment are not known, but it is reasonably probable that he lost confidence in his ability to obtain a conviction because of the contents of petitioner's records indicating Henry's claim was without merit as well as the inability of Henry to testify that he did not receive what he actually ordered. It is reasonably probable that the postal inspectors hoped to cure Henry's lack of testimonial knowledge of the identity of the stamps he ordered by obtaining his orders for his inspection in the civil case, before the criminal case was presented to the grand jury. The alleged fraud was discovered and the postal inspectors began their investigation in May of 1969. The civil case was instituted in April, 1970. The indictment was not presented until December, 1970. If the petitioner's records could be obtained at any time before the statute of limitations expires, the deficiency in the government's evidence will be corrected and it is reasonably probable the petitioner may be reindicted.

In a discovery deposition, Henry testified that he was complying with requests of the postal inspectors in the managment of his civil case, which was in fact a concession that his discovery proceedings were designed to obtain evidence for use in the parallel criminal case.

The District Court recognized that the threat of petitioner being re-indicted inhibited proceeding with discovery in the civil case when he stated on July 9, 1971, in open court:

> "THE COURT: Well, I would like to get the United States Attorney to let us know one way or the other,

because it's kind of becoming a comedy of errors and the discovery is impeded because of her potential criminal liability, if any, and at least, she can say there is a problem and until it is resolved, then it does inhibit the taking of her deposition and so forth."

A few minutes thereafter, the trial judge directed that petitioner submit her private records to Henry for inspection, and when the matter of petitioner's Fifth Amendment privilege was raised, the trial judge stated he would commit petitioner's attorney to jail if petitioner did not produce the records for inspection in the following language:

"THE COURT: Well, I want these documents in Mr. Heckendorn's [counsel for Henry] hands prior to that date, [Aug. 9, 1971] or on that date, he can take a default, and you will have your record and put it in any kind of shape you want it. I will have the court reporter here, and you can make a record.

"MR. EVANS: This is not the way the rules provide this should be done. Now the rules are binding on me—

"THE COURT: You can put that in the record, your objection to the rules. You have been told three or four times to exhibit those orders to the plaintiff. Now he is not going to ask for it again, and I am not going to ask for it again. So you can make your record any way you want to.

"THE CLERK: What time will that be scheduled for August 9, which is a Monday?

"THE COURT: We'll make it 10:00 o'clock.

"THE CLERK: Ten a.m., Monday, August 9.

"THE COURT: Well, arrange for Mr.—

"MR. EVANS: May I have a copy of this immediately? Because I don't know what I am going to do, but I have to do something.

"THE COURT: Well, you be ready to give those papers to Mr. Heckendorn, or you will be in jail, that's

what's going to happen. You will be in contempt of court. So he can also proceed with his default.

"MR. EVANS: Would you care to fix my bond now, Your Honor?

"THE COURT: No. I will fix the bond at the time on August 9 at 10:00 o'clock."

Before August 9, 1971, petitioner made application to the Court of Appeals for the Ninth Circuit for an Extraordinary Writ to stay the trial judge's hand. On August 9, 1971, that matter was still pending in the Court of Appeals for the Ninth Circuit. At the hearing on August 9, 1971, the trial judge stated in part:

"THE COURT: Well, I have not imputed, and don't intend to impute any bad faith in Mr. Evans. I think that when I lost my temper the other day and told him he had to turn those papers over to you, because it had been several months since he had been instructed to do that, I said if he did not turn them over, I would have the Marshall take charge of him, but I didn't mean to impute bad faith, or any intentional misstatement. • • •"

The trial judge further stated:

"THE COURT: Well, I will tell you, I will take one bit of advice from your lawyer. Mrs. Krug made a point, which I think is valid, and that is that your contumacious behavior is based upon a good faith opinion that your client needs the protection of the Fifth Amendment at all costs in this case.

• • •

"You have to resist turning these papers over, in good faith. I am willing to accept your good faith, and I'm not going to put you in jail. I think your courage is commendable. • • •"

It should be noted that Henry had never moved for an order pursuant to rule 37 requiring petitioner to produce

the records for inspection. Henry had been content to simply make the request and petitioner timely responded pursuant to rule 34, claiming Constitutional privilege. However, in the absence of any motion, as contemplated by the rules, for an order to compel production there was no proper forum in which to debate the issue. As a result there never was any hearing or ruling dealing with the assertion of privilege. The trial judge simply ordered production of the documents, *sua sponte*, and ignored all protestations of the assertion of the Fifth Amendment privilege. When it became apparent that the trial judge intended to enter an order of default, without ever affording petitioner a hearing as contemplated by rule 37, petitioner filed her affidavit, personally claiming her Fifth Amendment privilege. See Appendix E attached hereto.

Thereafter, the Court of Appeals for the Ninth Circuit declined to grant an extraordinary writ. On October 19, 1971, the trial judge entered an order finding petitioner and her counsel had willfully obstructed justice and were in contempt of court for having refused to produce petitioner's potentially incriminating private personal records. As punishment for these acts the trial judge struck petitioner's pleadings and entered an order of default. See Appendix F hereto. A hearing on the issue of damages was held but petitioner was not allowed to testify for the reason she had asserted her Fifth Amendment privilege. A judgment of $235,338,89 was entered against petitioner.

The decision on the appeal to the Court of Appeals is set forth in Appendix A and the order denying petition for rehearing as Appendix B.

REASONS FOR GRANTING WRIT OF CERTIORARI

(a) Issue Is Not An Isolated Case But a Wide Spread Misconception of Fifth Amendment Privilege

This court has heretofore granted certiorari in Cause No. 73-689, *Michael Anthony Maness*, Petitioner, *v. The Honorable James R. Meyers*, Respondent. The issues of law in this case are on all fours with the issues in that case. A decision in one disposes of the other. It is therefore respectfully requested that consideration be given to consolidating the cases.

In *Maness*, the Fifth Amendment privilege against being compelled to testify against one's self was denied because the documents the petitioner was required to produce in a civil action for an injunction had been displayed to the public on a newsstand. Here the right to claim the Fifth Amendment privilege against testifying against one's self is denied by the Court of Appeals for the reason:

> "Any incriminating information was already in the hands of prosecuting authorities."

Both in this case and in the *Maness* case, the lower courts misconstrued the thrust of the Fifth Amendment's prohibition against being a witness against one's self, erroneously believing that the privilege was wholly dependant upon secrecy.

It is obvious that these lower courts (and probably many others) conceived the novel theory that once the privileged evidence had been disclosed to anyone, the privilege was lost. The undersigned cannot improve upon the example set out in the petition in *Maness*:

> "To cite only one obvious example: The Fifth Amendment would have protected Jack Ruby against being

> subpoenaed to testify before a Dallas County grand jury that he shot Lee Harvey Oswald, despite the fact that millions of television viewers saw him do it."

Although the trial judge in the case at hand made no explanation why he disregarded petitioner's Fifth Amendment privilege, it is obvious that he, as well as the Court of Appeals, proceeded upon the false dual premise that the Fifth Amendment privilege protects only "private" (in the sense of "confidential") communications and that an individual who permits another to inspect private records thereby loses the protection afforded by the Fifth Amendment.

The common judicial reference to the Fifth Amendment privilege being a prohibition against "self-incrimination" has caused many courts to lose sight of the fact that the actual words of the Fifth Amendment prohibit a person from being "• • • a witness against himself, • • •". Unless this court promptly corrects this increasingly common erroneous view, the Fifth Amendment privilege will be eroded away. This court should point out it does not prohibit a prosecuting authority from producing incriminating evidence from sources other than the person charged, but it does prohibit any court from compelling such person to produce that evidence himself. The refusal of the petitioner to produce her potentially incriminating private records was an assertion of her right to refuse to be a "• • • witness against herself • • •" but that right was denied because of the misconception that prior disclosure destroys the privilege. Unless this bogus theory is quickly dispelled every witness or person accused will be faced with the impossible burden of proving the evidence demanded has never been disclosed to anyone else, which would in effect destroy the Fifth Amendment privilege.

(b) Conflict With Decisions of Other Circuits

FIRST CIRCUIT: *Ottomano v. United States,* 468 F.2d 269 (1st Cir. 1972) at page 273:

> "The great weight of authority is to the effect that waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding."

SECOND CIRCUIT: *United States v. Miranti,* 253 F.2d 135 (2d Cir. 1958) at page 139:

> "The government does not contend that the statements previously made by Bando to the FBI constitute a waiver of the privilege against self-incrimination to deprive him of the right to invoke the privilege in this grand jury hearing. Such contention would be frivolous because it is well established that a waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding."

THIRD CIRCUIT: *In re Neff,* 206 F.2d 149, 36 ALR2d 1389 (3rd Cir. 1953) at page 152:

> "It necessarily follows that a witness, such as the defendant here, who testified to a matter before the grand jury did not thereby waive her right to claim her constitutional privilege against self-incrimination as to the same subject matter when called as a witness in the subsequent trial of a person indicted by the grand jury. It has been so held by every appellate court before which the question has come."

FOURTH CIRCUIT: *United States v. Goodman,* 289 F.2d 256 (4th Cir. 1961) at page 259:

> "A waiver of the privilege must occur in the same proceeding in which it is sought to be invoked."

FIFTH CIRCUIT: *Poretto v. United States,* 196 F.2d 392 (5th Cir. 1952) at page 394:

> "The Constitutional privilege attaches to the witness in each particular case in which he is called upon to testify, without reference to his declarations at some other time or place or in some other proceeding."

(c) The Circuit Court Has Decided An Important Question of Federal Law, Which Has Not Been, But Should Be, Settled By This Court

This court has never specifically passed upon this issue, which is of great importance to the preservation of one of the most fundamental Constitutional privileges. Plea-bargaining is an established way of life, created out of economic necessity in criminal practice. To be meaningful, plea-bargaining frequently, if not always, involves disclosure of potentially incriminating evidence, even if it only furnishes a link in a chain of circumstances necessary to convict. If the decision of the Court of Appeals in this case, or the decision of the District Court in the *Maness* case, is allowed to stand, a legal precedent will be established. Thereafter no accused will dare enter into plea-bargaining negotiations lest the privilege against self-incrimination be lost. The Court of Appeals opinion in this case creates a new theory, contrary to what had heretofore been believed to be the settled law. See 58 Am. Jur. *Witnesses*, §99, at page 82:

> "A person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it *as to the same matter* in a subsequent trial or proceeding. The privilege attaches to the witness in each particular case in which he may be called on to testify, and whether or not he may claim it is to be determined *without reference to what he said when testifying as a witness on some other trial, or on former trial of the same case, and without reference to his declarations at some other time or place.*" (Emphasis supplied.)

In addition to the decisions of the Courts of Appeal heretofore cited, other courts have considered the law settled as contrary to the decision below. A few such decisions are: *United States v. Malone,* 111 F. Supp. 37 (N.D. Calif. S.D. 1953); *United States v. Steffen,* 103 F. Supp. 415 (N.D. Calif. S.D. 1951); *Apodaca v. Viramontes,* 212 P.2d 425, 53 N.M. 414, 13 ALR2d 1427 (N. Mex. 1949); and the Court of Appeals for the Ninth Circuit itself in *United States v. Cohen,* 388 F.2d 464 (9th Cir. 1967).

(d) The Decision of the Court of Appeals Has So Far Departed From the Admonitions of This Court That the Assertion of the Fifth Amendment Privilege Shall Not Be "Costly", As to Call for An Exercise of This Court's Power of Supervision

As pointed out in Appendix F, the trial court entered the default as punishment for petitioner's assertion of her Fifth Amendment right against self-incrimination. That order together with the judgment in the amount of $235,338.89 (as contrasted to the prayer for $71,242.68) is a "costly" penalty to pay for the assertion of a Constitutional privilege, and is contrary to the decisions of this court, including but not limited to *Griffin v. State of California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106; *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653; *Garrity v. State of New Jersey,* 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562; *Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574.

CONCLUSION

For the foregoing reasons petitioner respectfully prays that her petition for certiorari be granted.

Respectfully submitted,

VAUGHN E. EVANS
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN R. HENRY, JR.,
Plaintiff-Appellee,
v.
AMALIE SNEIDERS, and AMALIE SNEIDERS, as Personal Representative of the Estate of Maksis Sneiders, Deceased,
Defendant-Appellant.

No. 72-2096

[January 11 ,1974]

Appeal from the United States District Court for the Western District of Washington

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Before: DUNIWAY and WRIGHT, Circuit Judges, and EAST, District Judge.*

PER CURIAM:

This is an action for fraud and breach of contract arising from the sale of rare stamps through the mail. The plaintiff alleged that the defendants, Amalie Sneiders and Maksis Sneiders, who is now deceased, sold counterfeit stamps, misrepresented by them to be genuine, to the plaintiff. Proceeding under Fed. R. Civ. P. 34, plaintiff sought discovery of certain records concerning the disputed transactions. Following defendant's repeated refusal to produce these records, the district court entered default judgment in favor of the plaintiff pursuant to Fed. R. Civ. P. 37(b)(2).[1] Defendant appeals, and we affirm.

*Of the District of Oregon.

1. If a party . . . fails to obey an order to provide or permit discovery . . . , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . .
"(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

We consider appellant's six assignments of error separately.

1. *Were the defendant's records protected by the privilege against self-incrimination?* After the commencement of this civil action, the appellant and her husband were indicted for mail fraud, the indictment being based in part on the sale of stamps to the plaintiff. The indictment against the defendant was dismissed following the death of her husband, but the dismissal was without prejudice. Since the defendant was subject to criminal prosecution for the transaction at issue in the instant civil case, she claims that records concerning that transaction are protected by the Fifth Amendment privilege against self-incrimination.

The claim is without merit. Under an agreement between the prosecutor and appellant's husband, the records were handed to the postal authorities in connection with the criminal proceedings. Therefore, even if the records were incriminating, their disclosure in the civil case would not have tended to incriminate the defendant. Any incriminating information was already in the hands of the prosecuting authorities.

2. *Was the default judgment greater in amount or different in kind than that prayed for in the complaint?* Fed. R. Civ. P. 54(c) provides that a

> judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

The appellant argues that the judgment was different in kind from that prayed for in that it ran against her personally rather than as a member of the marital community. The plaintiff, however, prayed "for judgment against the defendants *and each of them, and* the marital community composed of them." (Emphasis added.) Therefore, the personal default judgment conformed to the pleadings.

The appellant also argues that the default judgment for $235,338.89 exceeded the $71,243.68 prayed for in the complaint. That part of the prayer, however, was for the amount that the plaintiff had paid to the defendants. In addition, plaintiff prayed for additional damages for breach

of contract, the amount of which was to be proved at trial.[2] The prayer was not limited to $71,243.68, and the default judgment did not exceed the amount prayed for.

3. *Should the district court have granted summary judgment in favor of defendant?* Appellant argues that plaintiff lacked sufficient evidence with which to prove his case and that summary judgment against him should have been awarded. Any insufficiency of the plaintiff's evidence was a direct result of appellant's refusal to comply with a legitimate request for discovery. The assignment of error is, therefore, entirely without merit.

4. *Should the trial judge have been disqualified for prejudice?* Appellant draws our attention to a number of dialogues between the trial judge and appellant's counsel in an effort to show prejudice on the part of the trial judge. The trial judge understandably expressed dissatisfaction and frustration over appellant's repeated refusals to produce the records. But our review of the record reveals that, notwithstanding this understandable frustration, the trial judge was extremely fair to the appellant and her claim of privilege. She was given repeated opportunities to produce the documents and avoid a default judgment, but she continued to refuse.

There is no evidence whatsoever of prejudice or improper conduct on the part of the trial judge.

5. *Was appellant entitled to a jury trial on the issue of damages?* After entering default judgment on the issue of liability, the district court held a hearing to determine the amount of damages. Although appellant had asked for a

2. Plaintiff prayed as follows:

"By reason of breach of the contract, misrepresentation, and fraud of the Defendants, Plaintiff has suffered a direct loss of the purchase price in the amount of $71,243.68, *together with additional amounts* not yet fully determined for appraisal examination costs, *loss of the value of the stamps as represented*, legal expenses and attorneys' fees, embarrassment, anxiety, and loss of health, the full amounts of which Plaintiff will prove at the time of trial. . . .

"WHEREFORE, Plaintiff prays for judgment against the Defendants *and each of them*, and the marital community composed of them, in the sum of $71,243.68 damages for funds fraudulently procured, *and for Plaintiff's other damages as are proved at the time of trial, together with interest and costs.*" (Emphasis added.)

jury on that issue, the court denied the request and proceeded without a jury.

Fed. R. Civ. P. 55(b)(2) authorizes a district court to hold an evidentiary hearing following a default judgment to determine damages.[3] The Rule preserves the right of trial by jury "when and as required by any statute of the United States." Appellant cites no "statute of the United States" requiring a jury trial under these circumstances. Nor is this court aware of any such statute. Therefore, the Rule does not itself require a jury trial on the issue of damages.

Nor does the appellant have a constitutional right to a jury trial under these circumstances, since the Seventh Amendment right to trial by jury does not survive a default judgment. *Brown v. Van Braam*, 3 U.S. 344 (1797); *Midland Contracting Co. v. Toledo Foundry and Machine Co.*, 154 F. 797 (7th Cir. 1907); *Johnson v. Bridgeport Deoxidized Bronze and Metal Co.*, 125 F. 631 (C.C.D. Conn. 1903); *Raymond v. Danbury & N.R. Co.*, 20 F. Cas. 332 (No. 11,593) (C.C.D. Conn. 1877); *Gill v. Stolow*, 18 F.R.D. 508 (S.D.N.Y. 1955), *rev'd on other grounds*, 240 F.2d 699 (2d Cir. 1957); 6 *Moore's Federal Practice* ¶55.07.

6. *Was the appellant denied a fair opportunity to offer evidence on the issue of damages?* Appellant argues that she was precluded from offering evidence at the hearing to determine damages. Although some evidence was excluded, it would have been relevant only as to liability and, since liability was not then an issue, the evidence was properly excluded as irrelevant. Appellant draws our attention to no excluded evidence which was relevant to the issue of damages.

Although she does not explicitly assign it as error, the appellant also argues that the district court made no formal

---

3. "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or *to determine the amount of damages* or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and *shall accord a right of trial by jury to the parties when and as required by any statute of the United States.*" Fed R. Civ. P. 55(b)(2). (Emphasis added.)

order for discovery. Since default under Fed. R. Civ. P. 37(b)(2) is permitted only for refusal to comply with a *court order* for discovery, appellant argues that default was improper. It is true that the district court did not issue a written order directing the appellant to produce the records. It is clear from an examination of the oral proceedings, however, that the district court had orally ordered appellant to produce the records. Where oral proceedings unequivocally give a litigant notice that certain documents are to be produced, the absence of a written order does not preclude the entry of a default judgment for failure to comply. *See Jones v. Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967); *Moore's Federal Practice*, ¶37.03.

Each of appellant's assignments of error is without merit. The judgment of the district court is affirmed.

The mandate will issue at once.

APPENDIX B

FILED
Feb. 19, 1974
U.S. Court of Appeals
DOCKETED
[Superimposed by Rubber Stamp]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN R. HENRY, JR., *Plaintiff-Appellee,* v. AMALIE SNEIDERS, and AMALIE SNEIDERS, as Personal Representative of the Estate of Maksis Sneiders, Deceased, *Defendant-Appellant.*	No. 72-2096 ORDER DC 9813 ATG

Before: DUNIWAY and WRIGHT, Circuit Judges, and EAST, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Duniway and Wright voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED:

APPENDIX C

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) PROCEDURE. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may

move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) PERSONS NOT PARTIES. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

APPENDIX D

Rule 37. Failure to Make Discovery: Sanctions

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) APPROPRIATE COURT. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) MOTION. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) EVASIVE OR INCOMPLETE ANSWER. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) AWARD OF EXPENSES OF MOTION. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving

party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) FAILURE TO COMPLY WITH ORDER

(1) SANCTIONS BY COURT IN DISTRICT WHERE DEPOSITION IS TAKEN. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or

defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of the subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION. If a party or an officer, director,

or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) SUBPOENA OF PERSON IN FOREIGN COUNTRY. A subpoena may be issued as provided in Title 28 USC § 1783, under the circumstances and conditions therein stated.

(f) EXPENSES AGAINST UNITED STATES. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

JOHN R. HENRY, JR., *Plaintiff,* v. MAKSIS SNEIDERS, *et ux.*, *Defendants.*	No. 8913 AFFIDAVIT OF AMALIE SNEIDERS CLAIMING CONSTITUTIONAL RIGHTS AND PRIVILEGES

STATE OF WASHINGTON }
COUNTY OF KING } ss.

AMALIE SNEIDERS, being first duly sworn upon oath, deposes and says that she is one of the defendants named in the above-entitled cause and is the surviving spouse of MAKSIS SNEIDERS, deceased, named as co-defendant in said cause:

That she does now personally claim her Constitutional rights and privileges, including but not limited to those guaranteed under the Fourth, Fifth, Sixth and Seventh Amendments, as they apply to the production of her books and records for inspection by plaintiff and his counsel, and ratifies all claims of privileges heretofore made by her attorney of record.

That she has good cause to believe, and does believe that if she were compelled to allow plaintiff and his counsel to inspect her books and records, that it would tend to incriminate her, and otherwise deprive her of her Constitutional rights and privileges; that she was indicted by a grand jury as a co-defendant in Criminal Cause No. 52129 in the United States District Court for the Western District of Washington, on charges arising out of the same allegation set forth in the plaintiff's complaint herein; that she has seen a copy of portions of the Postal Inspector's Report to the United States Attorney furnished as a basis for the decision to prosecute and the presentation of an indictment

to the grand jury; that said report states in the first paragraph:

> "The basis of the investigation was receipt of a complaint from an individual who purchased stamps in excess of $70,000.00 and later learned that the bulk of the stamps were forgeries.";

that the report later identifies the unnamed individual referred to in said quotation as the plaintiff in this civil suit.

That the affidavit of plaintiff's counsel filed herein on April 29, 1970, as a basis for the issuance of a writ of attachment states on page 2, lines 15 and 16: "The damages for which the action is brought are for injury arising from the commission of a felony."; that said claim was made to comply with the ninth ground for the issuance of a writ of attachment as set out in RCW 7.12.020

> "That the damages for which the action is brought are for injuries arising from the commission of some felony * * *";

that, if the allegations of plaintiff's complaint were true, the crime alleged could be prosecuted under the laws of the State of Washington as well as under the laws of the Federal Government.

That at the time co-defendant Maksis Sneiders consented to allow the United States Attorney to inspect our books and records, he was assured that by so doing he was not waiving any of his Constitutional rights and privileges and that the United States Attorney had agreed that by allowing such inspection neither Maksis Sneiders nor I would be in any way prejudiced in claiming our Constitutional rights and privileges; that neither Maksis Sneiders nor I would have allowed the inspection of the books and records without such assurances and agreement.

That at the time Maksis Sneiders agreed to allow the United States Attorney to inspect our books and records, he was assured that there was an agreement by the United States Attorney that none of the information contained in our books and records would be disclosed to the plaintiff, so that the plaintiff would not have any advance knowl-

edge of the information in our books and records either at the time he testified in the criminal case, or at the time he testified in the civil case; that Maksis Sneiders and myself were advised and believed that said agreement was a part of an agreement between our counsel and the United States Attorney that he would not disclose to us any information he obtained from the plaintiff herein, so that neither party to this civil suit would gain or lose any advantages by negotiating with the U.S. Attorney; that neither your affiant nor Maksis Sneiders would have consented to the inspection of our books and records by the United States Attorney, if it had not been for the assurance that the United States Attorney would not reveal any information gained from our books and records to the plaintiff so that the cross-examination of the plaintiff would not be prejudiced or rendered ineffective by advance knowledge of the information contained in our books and records.

That although the indictment in Criminal Cause No. 52129 has been dismissed, said dismissal is without prejudice and no guarantee of immunity has been tendered or offered to your affiant; that the statute of limitations on the crimes claimed by plaintiff to have been committed by your affiant will not expire for several years; that since the dismissal of the indictment in Criminal Cause No. 52129, your affiant has learned that the postal inspectors are still investigating your affiant, and the United States Attorney's Office is still interested in your affiant; that although your affiant does not know the full scope of the further investigation and study by the postal inspectors and the United States Attorney's Office, your affiant concludes, and therefore states as a fact, that there is a genuine threat that she may be prosecuted for some crime arising out of the claim of the plaintiff and that the information contained in her books and records would tend to incriminate her; that regardless of the action of the Federal Government your affiant could be charged in the State court on the allegations of the complaint.

That this affidavit is made for the purpose of complying with all requirements that the affiant personally claim her Constitutional rights and privileges; that in the event there

be some technical defect in the manner in which this assertion is made, your affiant respectfully requests that she be given the opportunity to cure such technical defect by further affidavit.

s/ AMALIE SNEIDERS

Amalie Sneiders

Subscribed and sworn to before me this 15th day of September, 1971.

s/ VAUGHN E. EVANS

Vaughn E. Evans

NOTARY PUBLIC in and for the State of Washington, residing at Seattle

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

JOHN R. HENRY, JR., *Plaintiff,* v. MAKSIS SNEIDERS and AMALIE SNEIDERS, *Defendants.*	No. 8913 ORDER OF DEFAULT

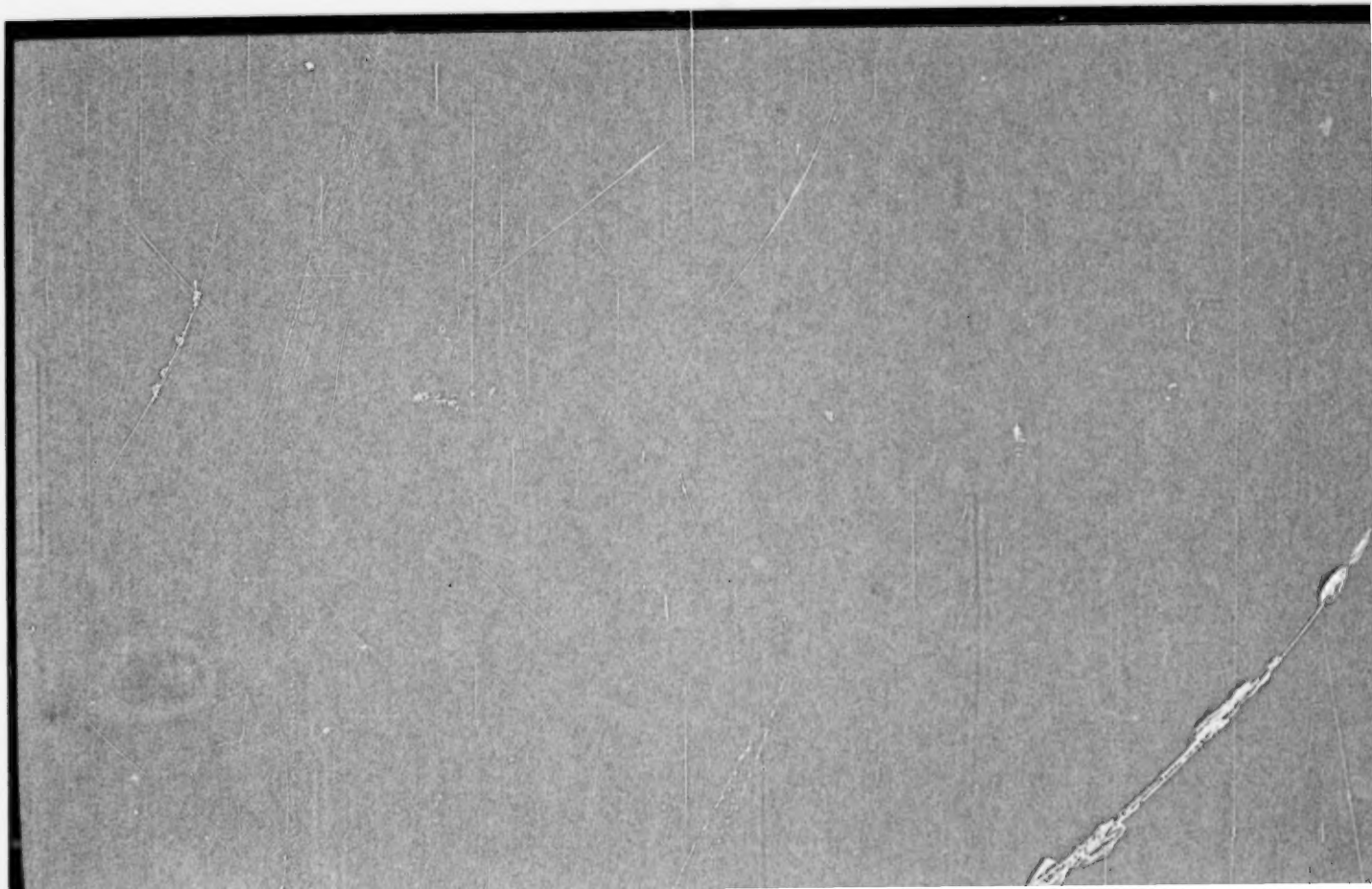
THIS MATTER came on regularly before the undersigned Judge sitting in the above entitled Court on August 9, 1971, pursuant to Order for Delivery of Documents or, alternatively, for a Default Judgment in accordance with Order entered July 9, 1971. The Plaintiff was represented by his attorneys, Heckendorn & Judd, C. Henry Heckendorn of counsel, and the Defendant, Amalie Sneiders, personally and as Personal Representative for Maksis Sneiders, deceased, was represented by her attorney, Vaughn E. Evans. The Court inquired whether or not the Defendant, Amalie Sneiders, or her attorney, Vaughn E. Evans, had complied with the foregoing Order of Court dated July 9, 1971, directing them to deliver at once to Plaintiff's attorneys for examination and for copying the originals of all orders for stamps delivered by the Defendants to the Plaintiff and the Court was advised that such orders had not been delivered. The Court thereupon directed the Defendant, Amalie Sneiders, personally and as Personal Representative of the Estate of Maksis Sneiders, deceased, through her attorney, Vaughn E. Evans and also ordered her attorney, Vaughn E. Evans, to deliver copies of all such orders to Plaintiff's counsel at this time. Counsel for Defendants refused and failed to comply with the above Order to Produce orders and with the previous Pre-Trial Orders herein, and gave no justifiable reason for not doing so. The Court finds that acts by the Defendants and their counsel constitute willful obstruction of justice and contempt of Court.

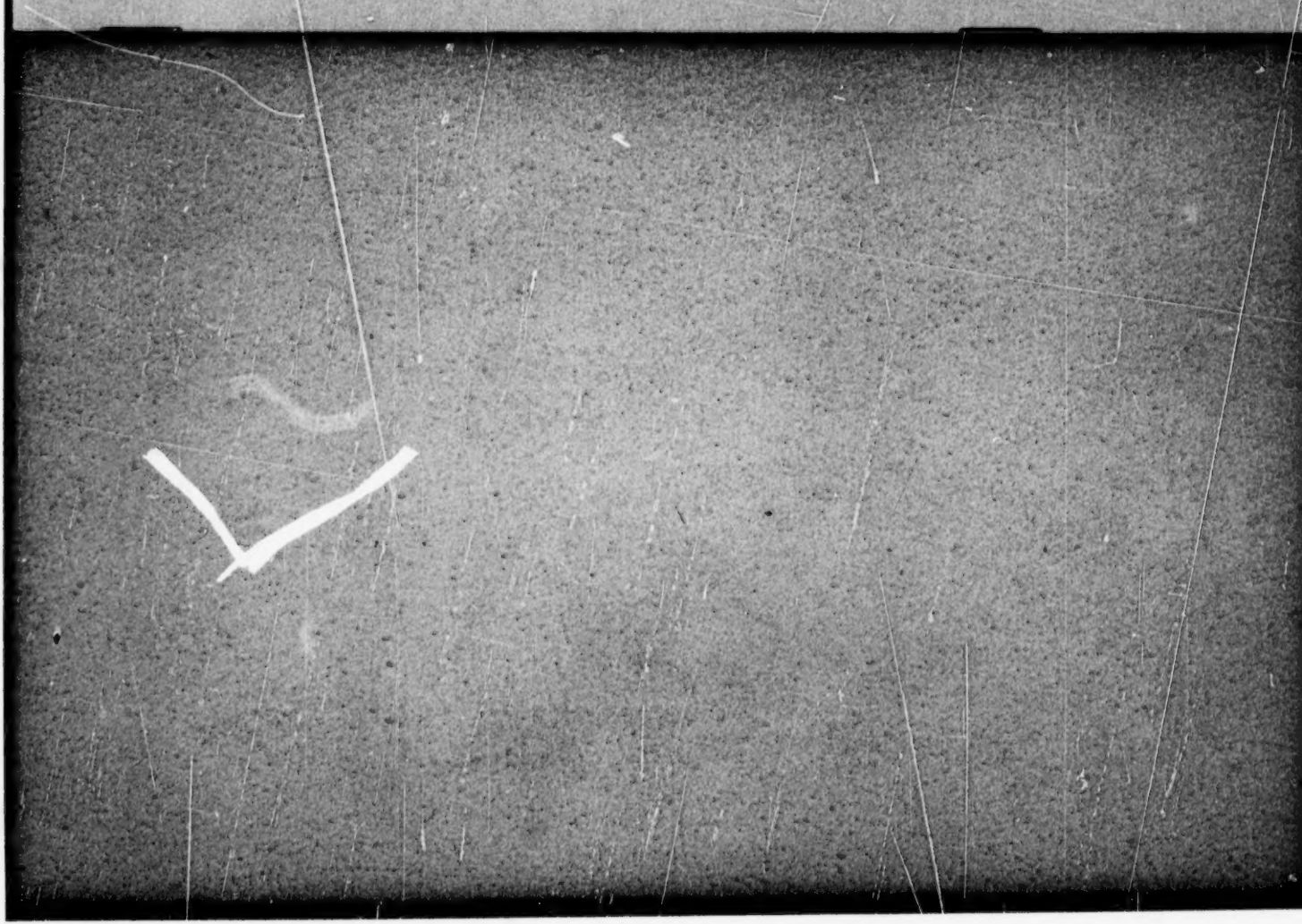
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the pleadings herein of Maksis Sneiders and Amalie Sneiders, his wife, and Amalie Sneiders, individually and as Personal Representative of the Estate of Maksis Sneiders, deceased, be and they are hereby stricken, and said Defendants and each of them be and they are hereby found and declared to be in default and Plaintiff is authorized to present evidence in support of his Complaint herein.

DATED this 19th day of October, 1971.

s/ ALFRED T. GOODWIN
Alfred T. Goodwin
Judge

Presented by:
s/ C. HENRY HECKENDORN
C. Henry Heckendorn
Of counsel for Plaintiff





COURT, U. S.
JUN 13 1974
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1709

JOHN H. HENRY, JR.,
Respondent,
v.
AMALIE SNEIDERS, and AMALIE SNEIDERS
as personal representative of the Estate of
MAKSIS SNEIDERS, *deceased,*
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COUNTERSTATEMENT OF THE CASE

The petition contains so many omissions or misrepresentations that it gives a completely erroneous impression of the facts. An accurate statement of the facts clearly indicates there is no issue to be decided by the court.

Maksis Sneiders and his wife Amalie (petitioner herein) had a stamp dealership in Seattle. Stamps were listed for sale in a different full page advertisement once each month in Linn's Stamp Weekly (a nationally distributed newspaper). An issue of the newspaper in which the many

stamps were listed for sale came to the attention of respondent in New York. Respondent put a pencilled checkmark beside those stamps he wished to purchase and forwarded the marked advertisement, with a check, to petitioner. This was done with respect to several of the advertisements. Respondent paid more than $71,242.68 for stamps before discovering that over 90% of the amount paid was for items not as represented, being either outright forgeries or at least not conforming to representations. Appellant sued each Mr. Sneiders and Mrs. Sneiders, and their marital community, praying for loss of value of the stamps as represented.

Thereafter both defendants were served with a subpoena duces tecum to bring the orders involved (and other records) to their depositions scheduled for June 23, 1970. Defendants moved through present counsel to quash the subpoena, citing only as grounds with respect to orders "conceivably defendants could be required to bring their records of sales to the plaintiff to a deposition, but to bring all of their records of purchases and sales [for the years 1966-70] to a deposition would not only be burdensome and oppressive, but would put defendants out of business." There was no opportunity for hearing on the Motion to Quash the Subpoena prior to the deposition. Without bringing the orders, in that deposition, the defendant Maksis Sneiders, with occasional voluntary assistance from Mrs. Sneiders, all in the presence of petitioner's attorney, testified (much of the time without any objection and with no mention whatsoever of privilege) in substantial detail concerning many aspects of the advertisement forms and marks thereon and some letters which constituted the orders by respondent for stamps. The testimony concerning

the various aspects of the orders and their contents takes up some fifteen or more pages of the fifty-page deposition, with occasional statements that to be fully accurate the information would have to be secured from the orders or records themselves (affirmed to be in the possession or control of petitioner and her husband).

Sometime later, petitioner learned from a customer that postal authorities were seeking information about petitioner's operation. Petitioner again consulted her present counsel. Apparently unaware of the extent of the knowledge of the postal authorities, and believing they could smooth the matter over, petitioner, through her present counsel, agreed to and did deliver to or make available to the postal authorities and the United States Attorney for examination and copying all of the Sneiders' records pertaining to their stamp business in exchange for the privilege of being allowed to appear and testify before the grand jury if the matter should be presented to a grand jury. The records copied included the orders from respondent which petitioner had previously and has subsequently refused to allow respondent to examine by discovery procedures or otherwise.

Both petitioner and her husband thereafter testified extensively before the grand jury upon the advice and accompanied to the courthouse by petitioner's present counsel without any claim of privilege.

Subsequently the grand jury returned an indictment against both petitioner and her husband on twenty-two counts of using the United States mail to defraud some *sixteen* different purchasers of stamps. After the indictment the trial court herein was careful to provide all proper constitutional protections for petitioner and her husband.

In another attempt in the year long effort to examine the orders, in March, 1971 respondent served petitioner with a Request for Production for Inspection under Rule 34 F. R. Civ. P. of the orders sent by respondent to petitioner. A pre-trial hearing on the pending matters was held April 5, 1971. At that hearing petitioner's counsel spent most of the time covered by the fifty-page transcript belaboring this position:

> "MR. EVANS: Your Honor, it's a part of our defense. This is impeachment.
>
> "THE COURT: Well, it's not going to be part of your defense . . . you're not going to try this case by surprise or by ambush. You are going to turn those records over to the plaintiff so he can see the order forms that you put in the advertising . . ."

The court stated that failure to produce the orders would result in an order striking Petitioner's Answer and entry of default. At that time counsel for petitioner advised the court:

> "Well, if they will produce . . . whatever stamps they are going to produce, we will gladly produce the orders, provided they produce here, in the clerk's office, all of the stamps they say they got from us and we will let them look at the orders."

On April 22, 1971, counsel for respondent wrote from Seattle, Washington, to the trial judge in Portland, Oregon, stating:

> "On Friday, April 9, 1971, I served a notice upon Mr. Heckendorn that I would take Mr. Henry's deposition in New York on Monday, April 26, 1971, at 1:00 P.M.
>
> "My professional obligation to my client requires that I take Mr. Henry's testimony before he sees the orders he sent and the letters he wrote."

The court acceded to this request by written Minute Entry as follows:

> "Judge Goodwin stated that it had been his intent on April 5, 1971, that a default judgment would be entered against defendant unless the purchase orders were turned over to Mr. Heckendorn by Mr. Evans on or before April 15, 1971.
>
> • • •
>
> "Judge Goodwin further noted Mr. Evans' desire to ask some questions of Mr. Henry at a deposition on April 26, 1971, before turning the purchase orders over to Mr. Heckendorn. Accordingly, Judge Goodwin ordered . . . that Mr. Evans may, on April 26, 1971, ask such questions of Mr. Henry as he wishes asked before the purchase orders are turned over. After these questions have been asked, answers given, and all objections to the questions and answers noted, Mr. Evans shall forthwith, then and there, turn over the purchase orders, and the deposition shall proceed."

Although copies of the foregoing minute entry and court order were in possession of petitioner's attorney at the deposition of respondent in New York City on April 26, 1971, petitioner's attorney contemptuously refused on several occasions to obey the clear order of the court, all as clearly recorded in the transcript of the deposition.

Respondent's husband, Maksis Sneiders, died on May 24, 1971. On June 16, 1971, the United States Attorney presented and there was entered an Order dismissing the criminal indictments against petitioner and her husband. Petitioner, as executrix of her husband's estate, was substituted as a party defendant in this civil suit.

Respondent duly brought on for hearing on July 9, 1971, all pending motions, discovery proceedings, and pretrial issues, and a motion for an order finding defendant and her counsel in contempt of court, striking the plead-

ings of the defendants, finding defendants in default, and granting judgment to the plaintiff for willful failure by the defendants and their counsel to comply with Orders of the court, and for willful and intentional obstruction of the procedures of the court and justice.

At the hearing July 9, 1971, the following exchange took place:

> "THE COURT: What is this hide-and-seek game going on? Why can't the plaintiff see those [orders]?
>
> "MR. EVANS [counsel for Petitioner]: As a matter of rebuttal, Your Honor, it's a matter of impeachment . . ."

And later:

> "The only thing that I've got left is impeachment, and I don't think the Court should deprive me of the only weapon I have left."

At the conclusion of the hearing on July 9, 1971, the court orally in open court and by proper written Order stated that after mature and careful consideration the court could find no justification for the willful failure to comply with the court's Orders of April 5 and April 22, 1971, or for refusal of petitioner and her counsel to deliver for examination and copying all orders of respondent to petitioner for stamps, and the court ordered such delivery by August 9, 1971, or, if not so delivered, that the court would on that date enter respondent's Motion for Default and find petitioner and her counsel in contempt of court.

At a hearing on August 9, 1971, the orders had not been delivered, petitioner's counsel again refused to do so, but, in response to respondent's request for the Order of Default, petitioner's counsel advised the court that petitioner had petitioned the Ninth Circuit Court of Appeals for an

Order to remove the trial judge from the case, and asked for a delay pending hearing on that petition. Bending way over backwards, the trial court orally and by written Order, delayed until five days after receipt of Order on the Petition from the Ninth Circuit entry of the Order of Default of Petitioner. The Ninth Circuit fairly promptly denied the petition (which had been very inaccurate and contemptuous). During the five days thereafter, on September 15, 1971, counsel for petitioner prepared an Affidavit for petitioner *for the first time* to personally claim that showing records to respondent on discovery might tend to incriminate petitioner, and petitioned the trial court to reconsider granting default. The trial court again carefully considered all questions involved and on October 12, entered an Order denying respondent's Petition to Reconsider the oral Order for Default, and a week later, on August 19, 1971, entered the Order of Default presented August 9, 1971, which Order authorized respondent to present evidence on the issue of respondent's actual damages.

The trial on damages was postponed at petitioner's request and petitioner, on January 6, 1972, was again given an opportunity to comply with the previous Order of the court to allow examination of the purchase orders involved, but did not do so.

On January 21, 1972, respondent's Memorandum Supporting Judgment substantially in excess of the amount ultimately granted was provided counsel for the petitioner. Petitioner and her counsel participated in the trial on February 4, 1972, where the evidence fully supported the damages granted. Thereafter, respondent moved for a new trial. Briefs were submitted, new trial was denied, and judgment

was finally entered on February 21, 1972. There was an appeal to the Ninth Circuit. The panel unanimously affirmed. The Petition for Rehearing en banc was unanimously denied.

CERTIORARI SHOULD BE DENIED

The facts show that the Circuit Court decision was fair and correct.

The trial court Order to deliver only orders for examination and copying was very narrow. It covered only advertisements published by petitioner in a national newspaper upon which respondent had made some check marks indicating the stamps respondent wanted, plus some letter orders from respondent. Since petitioner did not make the marks on the advertisements or letters, petitioner could not be held responsible for the markings. Petitioner delivered the orders to the investigating authorities for copying, upon advice of counsel, so any link in any chain of incriminating evidence was already voluntarily supplied. Only the orders were directed to be produced and those for examination only. No ruling was made or requested on their admissibility into evidence. No statement was ever made as to how the orders in any way could be incriminating. Only the right to surprise respondent was ever stated in support of claim of privilege.

The testimony by Mr. Sneiders, assisted by Mrs. Sneiders, at his initial deposition in this matter, covering some fifteen pages about the orders, constituted a waiver of any privilege against incrimination, if any had existed with respect to the orders.

> "Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from

the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her. Disclosure of a fact waives the privilege as to details. As this Court stated in *Brown v. Walker,* 161 US 591, 597 (1896):

> " 'Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.'
>
> "Following this rule, federal courts have uniformly held that where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details." *Rogers v. United States,* 340 U.S. 367, 372-373 (1950).

The assertion of privilege made some one and one-half years after Mr. Sneiders' testimony concerning the orders and their contents, after repeated statements in open court that petitioner's refusal to produce was for the purpose of preserving petitioner's right to surprise respondent, and after delivery of the material to law enforcement authorities, amply demonstrate *lack of good faith* by petitioner. The claim of privilege coming when it did constitutes only a grasp for a straw to support a continuing obstinate refusal to comply with long established fundamental discovery procedures. The only information available about any danger of incrimination comes from self-serving statements by petitioner or her counsel, many of which have since been refuted by petitioner. Likewise, delivery of the various orders and records to the prosecuting authorities has never been indicated as plea bargaining except in the petition herein.

When counsel for petitioner did, after one and one-half years, file an affidavit claiming privilege on behalf of

petitioner, the documents weret then held by petitioner in petitioner's representative capacity as executor of the estate of Maksis Sneiders, deceased.

> "Books and records kept 'in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally.'" *United States v. White* (1944), 322 U.S. 694; *Rogers v. United States,* 340 U.S. 367.

It is well settled that a witness is not exonerated from answering a question merely because the witness declares that in so doing he would incriminate himself. *Mason v. United States,* (1917) 244 U.S. 362; *Hoffman v. United States,* (1951) 341 U.S. 479.

It is for the trial court to decide whether even a genuine fear by a witness of incrimination is well founded. *Rogers v. United States, supra reh. den.,* 341 U.S. 912.

The court will require a witness to answer if it clearly appears to the court that the witnesses' refusal to answer on the ground of claimed privilege is mistaken. The trial court is in a better position to appreciate the essential facts than an appellate court can do and the trial court must be permitted to exercise some discretion and common sense. *Mason v. United States, supra.*

The trial court took into consideration all circumstances of the case, including previous disclosures. The trial judge "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." *Hoffman v. United States, supra.*

The facts utterly disposed of a claimed conflict with decisions of other circuits. The 9th Circuit Court of Appeals

correctly held that where the orders were already produced in the *criminal* action, their disclosure in the *civil* action could not increase or affect petitioner's *criminal* liability. This is not inconsistent with the authorities cited by petitioner, each of which was a criminal case or grand jury investigation of crime or criminal activity, where no prior disclosure had been made *in that case.*

The contumacious behavior of petitioner and her counsel resulted in liability by default. It did not affect the damages, nor respondent's burden of proof as to amount of damages. Petitioner participated in the trial on damages. There was absolutely no penalty. The damages were well within the scope of the pleadings and the evidence.

The instant case bears no relationship whatsoever to the petition in Cause No. 73-689, *Michael Anthony Maness, Petitioner, v. The Honorable James R. Meyers, Respondent.* The cases are clearly distinguishable on their facts.

Maness involves criminal contempt of an attorney who advised his client not to produce, in response to the prosecutor's subpoena duces tecum, allegedly pornographic material at a criminal trial. *Possession* of the subpoenaed material could lead to conviction, although the particular proceeding was principally for the purpose of enjoining the sale of the allegedly pornographic material. The municipal government in that case had not established the client's *possession* of pornography. The material was displayed for sale to the public. Presumably the prosecution contends this is a waiver of any claimed privilege as to the question of possession.

In the case at bar, the material, whether incriminating or not, is already in the hands of the prosecuting authorities. Here there is no question presented of an attorney being punished for advice given to his client. And more particularly, *Maness* deals with a proceeding brought under criminal statutes, while the instant case is wholly civil in nature. Petitioner was in no fashion "compelled in any criminal case to be a witness against herself."

Possession is not at issue in the instant case. Nor has petitioner ever claimed that the contents of the ads themselves were potentially incriminating. To the contrary, the Affidavit of Petitioner, set out at length in Petition as Appendix E, pages A-13 to A-16, discloses that the real purpose of non-disclosure was surprise, as shown previously.

SUMMARY

The purchase orders ordered to be produced were not privileged. The claim of privilege was not made in good faith. Even if the orders had been privileged, the privilege had been voluntarily waived by petitioner and by the estate petitioner represented by prior delivery of the requested orders to law enforcement authorities. Those who violate criminal laws (or who assert that they may be guilty of crime) should not be granted special advantages in civil suits over law abiding citizens. The decision of the trial and appellate courts was in accord with the decisions of this court and the circuit courts and was correct and fair.

The Honorable Trial Judge summed the matter up in his statement on this issue:

> "What I did feel and still do feel is that it's about as classic of an example as one could find of just obstinate refusal to cooperate with the discovery rules, the purpose of which are to prepare a case for trial."

The petition for certiorari should be denied.

Respectfully submitted,

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C. HENRY HECKENDORN,
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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1709

JOHN R. HENRY, JR.,
Respondent,
v.
AMALIE SNEIDERS, and AMALIE SNEIDERS
as personal representative of the Estate of
MAKSIS SNEIDERS, deceased,
Petitioner.

REPLY TO RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI

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RESPONDENT HAS FAILED TO ANSWER PETITION

Respondent makes no attempt to justify the opinion of the Court of Appeals. The opinion of the Court of Appeals is devoid of any citations of authority for it's new revolutionary doctrine that petitioner's husband's prior disclosure of potentially incriminating private records waives petitioner's Fifth Amendment privilege with the result that she can be punished for refusing to obey an order to produce those records. We have been unable to find any authorities sustaining that doctrine. Respondent cannot furnish any either.

As the case law now stands, five of the second highest appellate courts in the United States have ruled that a waiver of the Fifth Amendment privilege must occur in the same proceeding in which it is invoked. (See example quotations on pages 13 and 14 of Petition herein) Now, in this case, one court of equal rank rules exactly to the contrary.

Respect for law and judicial processes will not long endure in the face of such a flagrant conflict on such a basic fundamental cornerstone of our whole concept of freedom. One's rights must not be dependent upon the judicial circuit of his residence. It is respectfully suggested that this court has an obligation to quickly resolve this conflict.

The opinion of the Court of Appeals in this case goes even further and holds that a stranger (in this case petitioner's husband) somehow has the authority to destroy petitioner's Fifth Amendment privilege. We have been unable to find any record of a case where such a theory has even been advocated, and certainly no case where it has been followed. Respondent has not supplied any authorities to sustain the opinion of the lower court either.

The thrust of this new theory, relied upon in the opinion below, is exactly the same rationale as followed in the lower court in *Maness v. Meyers*, Cause No. 73-689 now pending in this court, *i.e.*, that prior disclosure to anyone destroys the Fifth Amendment privilege—in other words, that a disclosure of privileged evidence to anyone waives the privilege in all proceedings with the result that a court has the legal authority to compel an accused or a witness to produce such evidence. These two cases present identical issues and should be decided together.

REPLY TO RESPONDENT'S NEW MATERIAL

We recognize that this is not the place to review the complete record but that such chore should be reserved for the opening brief on appeal. However, there are many distortions and outright inaccuracies in respondent's brief which are obviously designed to influence the court adversely on the question of granting certiorari, on the theory that justice has prevailed even though the reasons for the Court of Appeals' decision cannot be sustained. At the risk of insulting the intelligence of members of the court, we will point out some of the most glaring misstatements, even though they may be obvious. Petitioner has requested the Clerk of the Court of Appeals to transmit the record to this court. Presuming this has been done, reference will be made to that record herein.

NO HEARING ON VALIDITY OF CLAIM OF PRIVILEGE

Summary of Argument

A stranger to the record could easily be misled by respondent's brief into believing that the trial judge held a hearing on the validity of petitioner's Fifth Amendment privilege, when, in fact, no such hearing was ever held. On page 10 of respondent's brief, an argument is made to the effect that the trial judge took into consideration all circumstances, but the fact is the order to produce incriminating records was *sua sponte* without any evidence, so there was never a forum in which petitioner could present her evidence.

Petitioner's affidavit of September 15 (Appendix E to the Petition herein) was filed when it became apparent

the trial judge was never going to afford petitioner a hearing. It contains all the evidence ever before the court on this issue.

ARGUMENT

The trial judge's home jurisdiction was the District of Oregon, but somehow he was assigned to hear this case in Seattle. All communications with the trial judge were by mail until April 5, 1971. A few days prior to that date, counsel were advised by phone that the trial judge would like to see them on that date. No motions of any kind were pending. On March 19, 1971, a request pursuant to Rule 34 had been served upon petitioner's counsel to produce virtually all of petitioner's records for inspection. The rule did not require petitioner to respond to that request until April 19, 1971, and petitioner had not done so by April 5, 1971.

On that date, without the remotest pretext of a hearing, the trial judge *sua sponte* orally ordered petitioner's counsel to produce all petitioner's private, personal records for inspection. There was no opportunity to present any evidence in support of her claim of privilege by affidavit or otherwise. The trial judge instructed that a form of order be served upon petitioner's counsel, which was done. However, petitioner's counsel filed written objection to that order and as a result, such order was never signed. Thereafter, the trial judge continually asserted orally that he had already ordered the records produced and therefore petitioner was in contempt for not obeying the order.

Because there never was a hearing on the issue of whether petitioner had a valid and good faith claim to assert the Fifth Amendment privilege, the record in this case is com-

pletely devoid of any findings of fact to support any legal conclusion as to whether the petitioner had a valid right to claim her Fifth Amendment privilege. The cases relied upon by respondent, *Mason v. United States*, 244 U.S. 362 (1917); *Hoffman v. United States*, 341 U.S. 479 (1951), and *Rogers v. United States*, 340 U.S. 367 (1950) *reh. den.*, 341 U.S. 912, all contemplate a hearing on the factual issues. Although no such hearing was ever held, the trial court did orally assert that petitioner had a good faith claim of the Fifth Amendment on August 9, 1971, as quoted on page 9 of the Petition herein.

Therefore, there is no merit in respondent's assertion that the trial judge took any circumstances into consideration. Further, it should be pointed out that the decision in the Court of Appeals does not mention or rely upon any such hearing or finding of fact. We have no quarrel with respondent's authorities that the trial judge should conduct an inquiry on the facts as to whether the Fifth Amendment may properly be invoked. But those authorities are not applicable because the trial judge did not hold such a hearing.

TIME OF CLAIMING PRIVILEGE

Throughout respondent's brief, it is asserted that petitioner's affidavit of September 15, 1971, is her first claim of Fifth Amendment privilege. This is an inaccurate statement.

The truth of the matter is the record shows that the Fifth Amendment privilege was first raised by motion served and filed on December 21, 1970, ten days after the indictment in the criminal case was returned. (Rec. pp. 138-140) That motion claims the privilege as to all discovery. The request

for production of the potentially incriminating, private, personal records was not made until three months later in March of 1971. Petitioner's privilege was very much in issue on April 5, 1971, the first time the trial judge appeared in Seattle. On page 5 of the transcript of those proceedings, respondent's counsel acknowledged the Fifth Amendment privilege issue in the following language:

> MR. HECKENDORN: "So it seems to me, at least, that the hiding behind the 5th Amendment at this stage is a complete facade and all it does is delay the action . . ."

The privilege is also discussed by petitioner's counsel or the trial judge on pages 21, 23, 24 and 30 of that transcript.

The quotation from the transcript of the proceeding on July 9, 1971, as set out on page 7 of the Petition herein, further shows that the privilege was brought to the court's attention on that date.

The trial judge acknowledged that petitioner's claim of the Fifth Amendment privilege was in "good faith" on August 9, 1971. (See quote on page 9 of the Petition herein.)

It is true that petitioner did not *personally* assert her Fifth Amendment privilege until September 15, 1971. However, there was no opportunity or occasion for her to personally assert her privilege until it became obvious that the trial judge was never going to afford her a proper hearing to be present or present evidence in any form. It must be pointed out that the affidavit of September 15, 1971, was served and filed before the order of default was entered on October 19, 1971, (Exhibit "F" to Petition herein) so the trial judge was well aware of the facts before he entered

the default. Attention is invited to the fact that the trial court completely ignored the claim of the Fifth Amendment privilege in that order as in all other orders.

Therefore, the emphasized statement on page 7 of respondent's brief that petitioner did not assert her Fifth Amendment privilege until September 15, 1971, is an inaccurate representation of the record.

DISCLOSURE TO INVESTIGATORS DOES NOT WAIVE PRIVILEGE AT TRIAL

Summary of Argument

Under all prior authorities, Maksis Sneiders would have the right to assert his Fifth Amendment privilege even if he had survived. Disclosure of records to an investigative officer does not waive the privilege to refuse to produce those records at a trial. The conduct of Maksis Sneiders could not possibly destroy the personal Fifth Amendment privilege of his surviving widow. The decision of the Court of Appeals here is in direct conflict with all such prior authorities.

Argument

On pages 8 and 9, respondent's brief asks the court to deny certiorari for the reason that by deposition Maksis Sneiders testified concerning the private, personal records respondent now contends the trial court could lawfully order petitioner to produce and argues that such testimony by Maksis Sneiders is a waiver of petitioner's personal right to claim the Fifth Amendment privilege.

This argument must fail for two reasons:

(a) The right to claim one's Fifth Amendment privilege is personal. *Couch v. United States*, 409 U.S. 322, 93 S.

Ct. 611, 34 L. Ed. 2d 584 (1973). Petitioner, Amalie Sneiders, was never deposed or otherwise testified concerning, or produced, the records in question. She made a timely claim of privilege through her counsel by motion on December 21, 1970 (Rec. 138-140). Thereafter, her counsel continuously and repeatedly asserted her Fifth Amendment privilege on her behalf. Finally, by affidavit on September 15, 1971 (Appendix E to Petition herein) she personally asserted the privilege.

(b) Petitioner's privilege could not possibly be waived by her husband answering questions during his deposition as to the existence of the records nor could her husband waive her privilege by turning over copies of the records to the United States Attorney during the course of the latter's investigation. It was not petitioner's acts or conduct but rather her husband's acts upon which respondent relies in support of his assertion of waiver. Respondent has not furnished a single citation of authority in support of the proposition that a third person may waive another's personal privilege of the Fifth Amendment. Petitioner has been unable to find any such authority either.

Moreover, the production of the records by Maksis Sneiders for inspection by the United States Attorney's staff conducting the investigation would not even constitute a waiver of Maksis Sneiders' Fifth Amendment right to refuse to testify or produce that same physical evidence in any subsequent proceeding. In a decision squarely in point, *Glotzbach v. Klavans*, 196 F. Supp. 685 (E.D. Va. 1961), Klavans permitted agents of the Internal Revenue Service to examine his tax books and records. After two days of examination by the agents, Klavans refused to permit them

to see the books again. The District Court held that Klavans knowing and voluntary permission given to the agents constituted a waiver of his Fifth Amendment rights for inspection, and inspection only, and that such waiver continued for a reasonable time. However, with regards to production of those records for any other purpose, the court squarely ruled that Klavans retained his constitutional privilege. The opinion states at pages 687 and 688:

> "We are not concerned with the question of immunity relating to the use of material provided voluntarily in one proceeding, but objected to in a prosecution under another proceeding. [citations omitted] Should it develop that Klavans is subsequently prosecuted, it is clear that he cannot be required to produce the records at the trial which he previously permitted the agents to examine."

Glotzbach v. Klavans has never been overruled but has been cited, and relied upon by numerous courts and accurately states the law. Under that authority, Maksis Sneiders would have been in exactly the same position as Klavans, had he survived.

By voluntarily providing the records for inspection by the United States Attorney, Maksis Sneiders did not waive his Fifth Amendment privilege to refuse to produce those same records at any subsequent proceeding. No court could lawfully compel him to be a witness against himself by producing those records.

The petitioner here is a giant step removed from the position of Maksis Sneiders. No claim is made that she has done anything which could constitute a waiver. Neither osmosis nor guilt by association can possibly visit the alleged sins of her husband upon her.

Where, then, does the lower court acquire the lawful authority to deny the petitioner the right to exercise her Fifth Amendment privilege? Certainly such authority cannot flow from the fact that she is Maksis Sneiders' surviving widow, or from her being appointed executrix of his estate. She has been placed in jeopardy by being indicted once, and the statute of limitations has not expired for her being reindicted. She has possession of the records. All the authorities confirm that she has the right to refuse to produce those records, except the Court of Appeals in this case.

THERE HAS BEEN NO WAIVER

By inference and innuendo, respondent attempts to mislead this court into believing that the incriminating records were already in the hands of the prosecutor in usable form. This is not true. As shown by petitioner's affidavit (Appendix E to Petition herein) the prosecuting authorities were not permitted to inspect or copy any records until they had first agreed that by so doing petitioner and her husband were not waiving their Fifth Amendment privileges. Therefore, although the prosecuting authorities may have knowledge of the contents of the records, they had no way of using those records as evidence and certainly cannot compel petitioner to produce them.

If petitioner could be forced to produce those records in the *civil* action, then the prosecutor could present that secondary evidence as an admission in a criminal prosecution. If the prosecutor could have found some lawful way to acquire possession of the records, in a form in which he could use them in the prosecution's case in chief, he could have used them against petitioner. However, the thrust of the Fifth Amendment, whether in a civil case or a criminal

case, is that the witness or accused cannot be compelled to produce evidence, oral or documentary, which will furnish a link in evidence needed to obtain a conviction.

Therefore, the prior disclosure to the prosecuting authorities did not constitute a waiver of the Fifth Amendment privilege, and even if it had, under the law of the First, Second, Third, Fourth and Fifth Circuits, that waiver would not have been effective in this separate civil proceeding.

ANSWER TO THE IMPEACHMENT ARGUMENT

Effort has been made in respondent's brief to mislead the court that petitioner's counsel somehow waived petitioner's Fifth Amendment privilege by arguments that he intended to use the records for impeachment purposes. In the first place, this is a falacious argument, as counsel cannot waive his client's constitutional privilege. Only pettitioner can do that by her personal conduct.

Secondly, the argument regarding the use of the records for impeachment was an alternate reason for refusing to produce the records for inspection. The local rules for the United States District Court for the Western District of Washington provide that documents intended to be used solely for purposes of impeachment shall be sealed in an envelope and marked by the clerk for identification, and thereafter may be received in evidence solely for impeachment. Since the discovery proceedings have shown that respondent could not produce any evidence on the description of the merchandise he ordered, he would be hard put to prove that the merchandise he received was different in quality or description from that which he ordered, in either the criminal or the civil case. If respondent, in either the

civil or the criminal case, asserted he had ordered stamps which he had in fact not ordered, the records of his orders would then become useful for impeaching his testimony.

However, that argument was not in any manner a waiver of the petitioner's Fifth Amendment privilege.

It is true, however, that petitioner's counsel did attempt to work out a compromise as contemplated by Rule 26(c)(8) whereby both parties would be required to submit all of their documentary evidence simultaneously under an order that neither party could inspect the other party's documents until all records had been so submitted. Respondent's adamant refusal to participate in any such arrangement raises a suspicion that he was attempting to recover his losses in purchasing forged stamps from stamp dealers other than petitioner's husband.

Therefore, there is no merit whatever in the assertion that petitioner waived her Fifth Amendment privilege because her counsel argued a theory, contemplated by court rule, of withholding documents for impeachment and tried to work out a compromise as contemplated by Rule 26(c)(8).

ANSWER TO ARGUMENT ON PETITIONER HOLDING RECORDS IN REPRESENTATIVE CAPACITY

On page 10 of respondent's brief, it is asserted that petitioner held her records in a representative capacity. Although petitioner was substituted as a party defendant for Maksis Sneiders, in her capacity as executrix, she was also a party to the action in her own right. The judgment runs against her personally as well as the estate. Under the community property laws of the State of Washington, she

owned an undivided one half interest in those records and had just as much right to possession as her husband. She was personally indicted. Her possession of the records was not by reason of her appointment as executrix. She had the right to assert her personal constitutional privilege.

Under no circumstances could she be held to be holding those records in a representative capacity as contemplated by the decisions of this court. The records were not held as a representative of a union as in *United States v. White*, 322 U.S. 694 (1944) nor as an officer of a corporation, as in *United States v. Kordel*, 397 U.S. 1, 25 L. Ed. 2d 1 (1970).

REFERENCE TO CONTUMACIOUS BEHAVIOR

Throughout respondent's brief and the record herein, respondent's counsel has frequently characterized the behavior of petitioner and her counsel as "contumacious." This record is devoid of any remark of any kind impuning the integrity of the trial judge or the court. The so called "contumacious behavior" consists solely of refusing to obey an illegal order of the trial judge directing petitioner to produce her private, potentially incriminating records for inspection and relying upon her Fifth Amendment privilege.

ANSWER TO ARGUMENT OF NO PENALTY

On page 11, respondent's brief argues that there was no penalty imposed upon petitioner for asserting her Fifth Amendment privilege. The court is reminded that petitioner was denied the right to a trial on the issue of liability. That is a very severe penalty. The fact that she was permitted to make a partial attempt to present evidence on the issue of damages does not cure that penalty.

FIFTH AMENDMENT NOT RESTRICTED TO CRIMINAL CASES

On page 11 respondent argues that petitioner's citations from other circuits all pertain to criminal cases and are therefore not in point, but supplies no authority in support of that argument. The Fifth Amendment privilege is as available in a civil case as in a criminal case, and the law pertaining thereto is the same. See *United States v. Kordel*, 397 U.S. 1, 25 L. Ed. 2d 1, 90 S. Ct. 763 (1970).

CONTENTS OF ORDERS NEVER REVEALED

On page 8, respondent's brief attempts to inform the court on the contents of the records petitioner refused to produce. Since petitioner has never produced the records, respondent has no knowledge of any additional notations petitioner's husband may have made on those records or what purposes they serve. Respondent may have some memory of the records as he last saw them, but he certainly has no information of their present condition, and there is no evidence in this record as to the present contents of the records. However, it should be obvious that those records would be a link in a chain of circumstances necessary to convict, should the United States Attorney elect to reindict the petitioner.

ANSWER TO RESPONDENT'S SUMMARY

On page 12, respondent's brief argues that if the petitioner has a Fifth Amendment privilege, then criminals and those who claim they might be criminals have special advantages in civil suits over law abiding citizens.

This is but another version of the complaint of the misinformed that the Fifth Amendment privilege was created

to enable the guilty to escape punishment. Those who have studied the history of the Fifth Amendment recognize that it has its origins in the protection of the innocent dating back to the days of the inquisition, and its purpose remains the same today.

To accept the basic fundamental principal of the Fifth Amendment, and the freedom it insures, one must also be prepared to accept the fact that in some instances the guilty will also escape. We mortals are imperfect, and therefore our institutions are imperfect. However, history has proven that our concept of freedom, founded primarily upon the Fifth Amendment, is the more desirable of the opposing philosophies.

Unless respondent is advocating a change in the Constitution, his argument must be rejected.

In this instance, however, it must be recognized that respondent finds himself without any evidence to prove the description of the stamps he ordered solely through his own negligence. It would have been a simple matter for him to have kept copies of the some $72,000.00 worth of orders he sent petitioner's husband. If, in fact, he failed to do so, this court should not be called upon to change the Constitution to assist him.

Respondent's summary further asserts with pride the statement of the trial judge characterizing petitioner's conduct as "obstinate refusal to cooperate with the discovery rules".

Both the trial judge and the respondent misconceive

the purpose of the discovery rules. Rule 26(b)(1) admonishes that discovery is limited to matters which are not privileged in the following language:

> "Parties may obtain discovery regarding any matter, *not privileged* . . ." (Emphasis supplied)

It should also be noted that the discovery rules contemplate circumstances which may very well be present here, where one party is seeking to perpetrate a fraud upon the other by inspection of records before being required to produce his own evidence. Rule 26(c)(8) provides a procedure for both parties to simultaneously submit their records for inspection. Respondent adamantly refused to consider an offer to resolve his dilemma under that rule.

CONCLUSION

Petitioner has shown in this reply brief that respondent has utterly and completely failed and refused to supply any authorities or rationale as to why this court should not grant certiorari to resolve the intolerable conflict between the opinion of the Court of Appeals in this case, and the settled law in all other jurisdictions, including but not limited to the decisions of the First, Second, Third, Fourth and Fifth Circuits, where it has heretofore been considered. It does not appear that the Sixth, Seventh, Eighth and Tenth Circuits have considered the issue.

Equally as important, petitioner has shown that the Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The respondent's answering brief is primarily devoted to arguments that the result reached by the court of Appeals

is just, even though it cannot be supported by any legal authorities, and therefore this court should deny certiorari. Petitioner suggests such an argument is not a valid basis for denying certiorari.

Since the legal issues presented in the *Maness* petition, Cause No. 73-689 now pending in this court for argument, are identical with the issues here, granting certiorari is not likely to increase this court's work load, particularly, if the cases are consolidated as originally suggested in the petition submitted herein.

Respectfully submitted,

VAUGHN E. EVANS
Attorney for Petitioner



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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1709

AMALIE SNEIDERS, and AMALIE SNEIDERS
as personal representative of the Estate of
Maksis Sneiders, deceased,
Petitioner,

v.

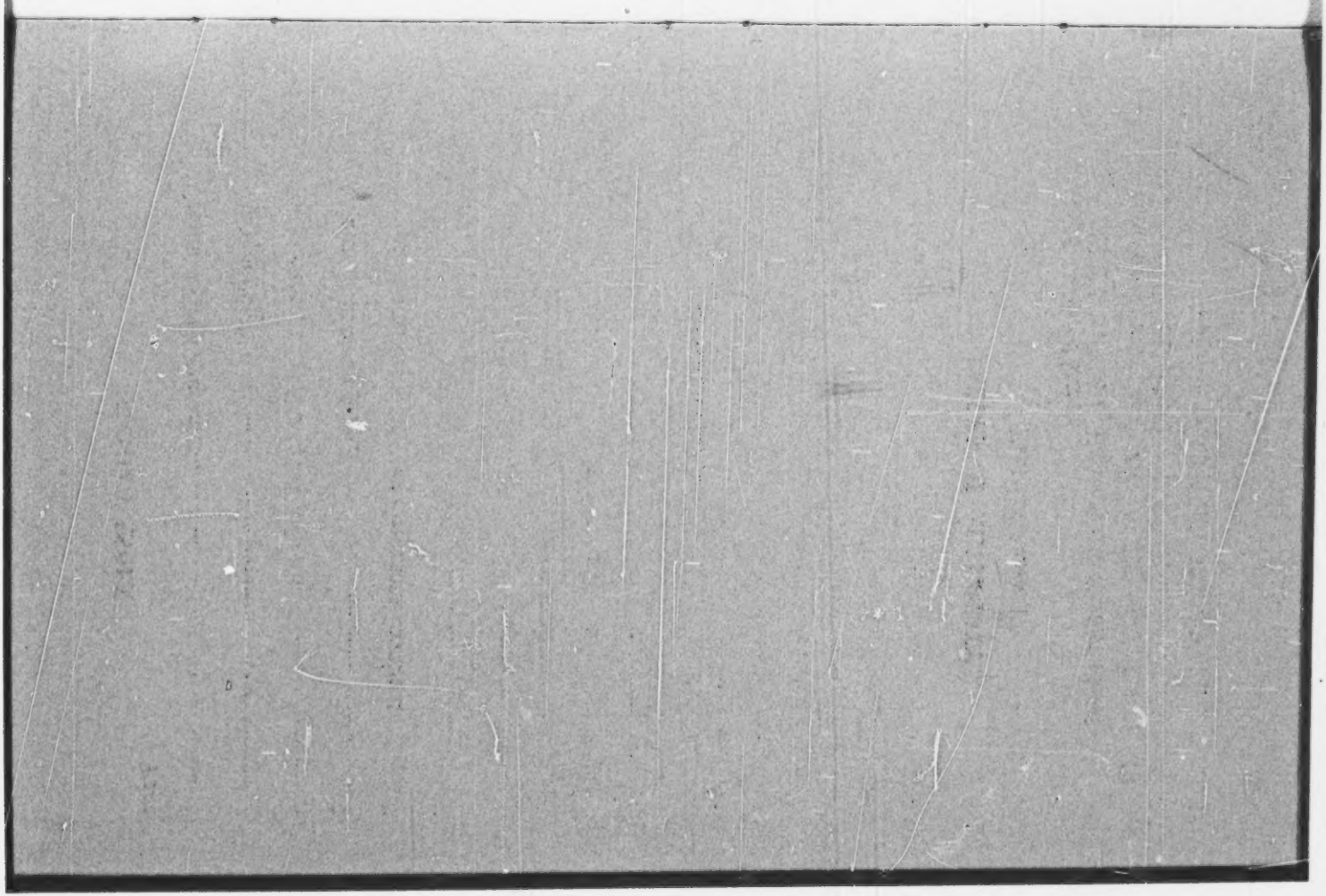
JOHN R. HENRY, JR.
Respondent.

PETITION FOR REHEARING ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1974

No.....

AMALIE SNEIDERS, and AMALIE SNEIDERS
as personal representative of the Estate of
Maksis Sneiders, deceased,
Petitioner,

v.

JOHN R. HENRY, JR.
Respondent.

PETITION FOR REHEARING ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF COUNSEL

Pursuant to Rule 58(2), petitioner prays that Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, 490 F.2d 315, upon substantial grounds available to petitioner, although not previously presented. Counsel for Petitioner hereby certifies that this petition is presented in good faith and not for delay and is restricted to the above specified grounds.

Douglas E. Evans

VAUGHN E. EVANS, *Council for Petitioner*

OPINION BELOW

Opinion below is reported at 490 F.2d, Appendix A hereto.

JURISDICTION

(i) Court of Appeals decision dated January 11, 1974.

(ii) A petition for rehearing duly served and filed January 24, 1974, and denied February 19, 1974 (Appendix B).

Original Petition for Certiorari submitted May 15, 1974, No. 73-1709 and denied October 15, 1974.

(iii) The statutory provisions conferring jurisdiction:

Diversity suit instituted pursuant to 28 USCA 1332; Court of Appeals jurisdiction, 28 USCA 1294; jurisdiction of this Court invoked by 28 USCA 1254.

QUESTIONS PRESENTED

(1) May a husband waive his wife's Fifth Amendment privilege against self-incrimination without violating the due process clause of the Fifth Amendment?

(2) Does the due process clause of the Fifth Amendment permit a trial judge to, sua sponte and without notice, pleadings, evidence or a hearing, order a defendant to produce potentially incriminating records held in her sole and exclusive possession, when she has made a good-faith claim of her Fifth Amendment privilege against self-incrimination?

(3) Does a Federal Court violate the Fifth Amendment due process clause by striking defendant's answer, in toto, including affirmative defenses, and entering a judgment by default as punishment for defendant's concededly good-faith reliance upon her privilege against self incrimination?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment reproduced as Appendix C.

Revised Code of Washington, §26.16.030—Appendix D.

Revised Code of Washington §62A.2-327 Appendix E.

STATEMENT OF THE CASE

During the period January, 1967 to May, 1969, plaintiff below, hereinafter referred to as "Henry," ordered merchandise by mail, from petitioner's husband, herein referred to as "Maksis," who operated a mail order business out of his home with the help of his wife, herein referred to as "Amalie." The total purchase price paid for the several written orders was $71,242.68. The terms of the sale were "Immediate Cash Refund If Not Satisfied." In April, 1970, (10 months after the last order) Henry first made known his dissatisfaction with the merchandise received by demand for a refund of the entire purchase price paid, claiming a substantial portion of the merchandise did not conform to his orders. Henry made no offer to return the merchandise. When refund was declined, this suit was instituted against Amalie and Maksis Sneiders and their marital community. Discovery procedures established that Henry had ordered two types of merchandise which for brevity will be classified as "genuine," (consisting of authentic rare stamps actually used for postage) and "non-genuine", consisting of "reprints" (stamps printed from the same plates as genuine, but not sold or used for postage), "specimens" (stamps printed by the issuing authority but not for use as postage), "facsimiles" (non-genuine stamps made to look like genuine stamps), and other various forms of collectors' items not represented to be genuine items.

The liability issue was whether any "non-genuine" merchandise had been substituted for "genuine" merchandise.

Henry claimed the merchandise he ordered had increased in value by 300 percent in the three years since

his first order, and alleged he was entitled to damages in an amount three times the price paid for the merchandise.

Henry admitted in answer to interrogatories he could not describe the merchandise he ordered and had not kept copies of his orders. Henry also declined to describe all the merchandise he had received. Thus Henry had no evidence of the description of the merchandise he ordered and declined to divulge the description of the merchandise he received. Defendants denied the material allegations of the complaint and affirmatively asserted laches as provided by the Uniform Commercial Code, which requires a buyer to "seasonably" exercise his option to return the goods and demand a refund as provided by the Uniform Commercial Code, RCW 62A.2-327 (Appendix E).

After the civil case was commenced, defendants learned that Henry had complained to the postal inspectors and that the United States Attorney was considering presenting an indictment against Maksis on the same allegations as in the civil action. In an attempt to show the United States Attorney the lack of merit in the proposed criminal case, Maksis allowed the United States Attorney to inspect the written purchase orders received from Henry, which demonstrated the volume of non-genuine merchandise Henry had ordered. Since these written orders were the personal property of the marital community, Maksis had the absolute right to authorize this inspection without the permission or authority of Amalie. (See Appendix D, RCW 26.16.030, since amended but the law of the State of Washington at all times material herein, vesting the husband with the sole management and control of the community personal property).

The United States Attorney agreed: (1) not to make copies of the Henry purchase orders, (2) that the inspection was without prejudice to any claim of Constitutional privilege that might later be made, (3) that the contents of the orders would not be revealed to Henry. After inspection, the orders were returned to Maksis and later came into Amalie's possession upon Maksis Sneiders' death. Amalie Sneiders had possession of the only copies of the orders. Their contents could only be proven through production by her and her testimony. Neither the United States Attorney nor Henry could present these orders or their content as evidence in either the civil or the criminal case without the testimony of Amalie Sneiders.

The efforts to dissuade the United States Attorney from presenting the criminal case to the Grand Jury were unavailing. An indictment for mail fraud was returned against both Amalie and Maksis Sneiders on December 10, 1970. Thus, the Sneiders were faced with parallel criminal and civil actions involving the same transactions. Defendants immediately moved to be relieved from being required to make any discovery in the civil case, asserting their Fifth Amendment privilege against self-incrimination.

Defendants thereafter made a request pursuant to Rule 34 that Henry produce the merchandise he actually received for inspection, but Henry refused to do so.

On March 20, 1971, Henry made a request, pursuant to Rule 34, that defendants produce the purchase orders for inspection by Henry and his attorneys. Rule 34 allows 30 days to respond to such a request.

On April 5, 1971, fourteen days before defendants were required under Rule 34 to make any response, the trial judge made an informal request that counsel appear before

him. There was no notice of any issues to be presented or any hearing to be conducted. However, the trial judge proceeded to force counsel to explain why the purchase orders had not been produced for Henry's inspection. The trial court was orally reminded that defendants were claiming their Fifth Amendment privilege against self-incrimination and that there yet remained 14 days before any response was required. Nevertheless, the trial judge proceeded as though he were hearing a motion for sanctions pursuant to Rule 37. No such motion was before the judge, and, indeed, no such motion could have been made until the expiration of the 30 days provided by Rule 34, and then the motion would have to be supported by an affidavit or other evidence showing that the reasons for the refusal to produce the purchase orders were not legally sufficient.

During the course of the discussion, the trial judge revealed that he had personally conducted a factual investigation on his own initiative, without notice to counsel, by reading the clerk's file in the criminal case, which was not assigned to him. From that file the trial judge learned the United States Attorney had been permitted to inspect the Henry orders. However that file did not contain any of the details of the agreements that the prosecutor would not copy, would not reveal the contents to Henry and that such inspection was without prejudice to any claims of constitutional privilege. If due process had been afforded petitioner, by n o t i c e and pleadings, those agreements would have been presented. But the trial judge ruled *sua sponte* without ever affording petitioner an opportunity to present the facts. Thereafter, petitioner tried to bring those facts to the judge's attention, but he simply took the position that he had ruled and the matter was closed.

Without stating any reasons or legal authority, the trial judge *sua sponte orally* ordered defendants to produce the Henry orders for inspection despite the fact that there were no pleadings or other notice that such an order would be considered. The trial judge intended and directed that a written order be entered, but no such written order was ever entered. Consequently, only a *sua sponte* oral order was made. No defendant was personally present.

On May 26, 1971, Maksis died. On June 16, 1971, the United States Attorney dismissed the indictment against Amalie without prejudice to her being reindicted. The statute of limitations had several years to run. Petitioner is not privy to all the reasons why the United States Attorney dismissed the indictment, but it is reasonable that he recognized the impossibility of proving a crime without evidence of the purchase orders and that in the event Henry was able to obtain the purchase orders through discovery in the civil case, a new indictment could be obtained. Henry admitted he was passing the information acquired by discovery to the postal authorities.

On July 9, 1971, the trial judge recognized that the dismissal of the criminal indictment without prejudice did not relieve Amalie Sneiders of her potential criminal liability and that she was entitled to the protection of the Fifth Amendment privilege against testifying against herself in the following language:

> "THE COURT: Well, I would like to get the United States Attorney to let us know one way or the other, because it's kind of becoming a comedy of errors and the discovery is impeded because of her potential criminal liability, if any, and at least, she can say that there is a problem and until it's resolved, then it does inhibit the taking of her deposition, and so forth."

A few minutes later the trial judge lost his temper (as he admitted for the record on August 9, 1971) and the following proceedings occurred:

> "THE COURT: Well, I want all these documents in Mr. Heckendorn's [counsel for Henry] hands prior to that date, [August 9, 1971] or on that date, he can take a default, and you can have your record and put it in any kind of shape you want it. I will have the court reporter here, and you can make a record.
>
> "MR. EVANS: This is not the way the rules provide that this should be done. Now, the rules are binding on me—
>
> "THE COURT: You can put that in the record, your objection to the rules. You have been told three or four times to exhibit those order forms to the plaintiff. Now, he is not going to ask for it again, and I am not going to ask for it again. So you can make your record any way you want to."

This language contains the sole and only reason given by the trial judge for ordering defendants to produce the purchase orders for inspection—to-wit, he had orally directed it to be done. The only prior order was the *sua sponte* April 5, 1971, oral order. The proceedings then continued:

> "THE CLERK: What time will that be scheduled for August 9th, which is a Monday?
>
> "THE COURT: Well, make it ten o'clock.
>
> "THE CLERK: 10:00 a.m., Monday, August 9th.
>
> "THE COURT: Well, arrange for Mr.—
>
> "MR. EVANS: [Addressing the Court Reporter]: May I have a copy of this immediately? Because I don't know what I am going to do, but I've got to do something.
>
> "THE COURT: Well, you be ready to give those papers to Mr. Heckendorn, or you will be in jail, that's

what's going to happen. You will be in contempt of Court. So he can also proceed with his default.

"MR. EVANS: Would you care to fix my bond now, Your Honor?

"THE COURT: No, I will fix bond at the time, on August 9th at ten o'clock."

Thereafter, on August 9, 1971, the trial judge stated in part as follows:

"THE COURT: Well, I have not imputed, and don't intend to impute any bad faith to Mr. Evans. I think that when *I lost my temper* the other day and told him he had to turn those papers over to you, *because it had been several months since he had been instructed to do that,* I said if he did not turn them over, I would have the Marshall take charge of him, but *I didn't mean to impute bad faith,* or any intentional misstatement . . . . Well, I will tell you, I will take one bit of advice from your lawyer. Mrs. Krug made a point, which I think is valid, and that is that your consumacious (sic) behavior is based upon a *good-faith opinion* that your client needs the protection of the Fifth Amendment at all costs in this case . . . *You have to resist turning these papers over, in good faith.* I am willing to accept your *good faith,* and I'm not going to put you in jail. I think your courage is commendable . . . ."
[Emphasis supplied].

In the foregoing quotation, the trial judge openly admits that his sole reason for ordering defendants to produce the purchase orders for inspection was the fact that he had orally "instructed" that it be done. That assertion can only refer to the proceedings on April 5 and July 9, 1971, when, without notice, pleadings or evidence the trial judge, *sua sponte,* orally ordered production for inspection.

Thereafter, Amalie Sneiders personally claimed her Constitutional privilege against self-incrimination by affidavit dated September 15, 1971. On October 19, 1971, without

further notice, hearing or evidence, the trial court entered an order of default, reproduced herein as Appendix F, wherein he admits the default is punishment for Amalie refusing to comply with the order of the court, which was in fact only a *sua sponte* oral order, made without notice, evidence or pleadings.

Judgment was rendered against petitioner in the sum of $235,338.89, without allowing her an opportunity to present any of the many defenses on the issues of liability.

REASONS FOR GRANTING CERTIORARI

First Question Presented

The Court of Appeals refused to reverse the entry of the order of default solely upon the excuse that Maksis Sneiders permitted the United States Attorney to inspect the Henry orders. The Court of Appeals ruled that petitioner's husband had waived petitioner's Constitutional privilege against self-incrimination in the following language:

> "Under an agreement between the prosecutor and *appellant's husband,* the records were handed to the postal authorities in connection with the criminal proceedings. Therefore, even if the records were incriminating, their disclosure in the civil case would not have tended to incriminate the defendant." [Emphasis supplied].

Whether the Court of Appeals was moved by the fact that Maksis was of the male sex or that as a husband he had the right to waive Amalie's Constitutional privilege against self-incrimination, would seem to be unimportant. The basic fact is Amalie did nothing, either voluntarily or involuntarily, to waive her Constitutional privilege. She had steadfastly maintained her assertion of the Constitutional privilege against self-incrimination, first through

counsel and later through her personal affidavit. Waiver of a constitutional privilege cannot be inferred or presumed. It can only be accomplished by knowing and intentional conduct. *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed 2d 694, 86 S. Ct. 1602; *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461 (1938); *Glasser v. United States,* 315 U.S. 60.

The Court of Appeals gives us no citations of authority and we have been unable to find any. It is, therefore, conclusively established that the Court of Appeals *invented* this new and devastating theory that marriage vows transfer a wife's right to assert or waive her Constitutional privilege to the husband—in short reduces her to a second class citizen. Unless this court concurs with the underlying premise, inherent in the opinion of the Court of Appeals, that wives are mere chattels whose destinies are legally controlled by their husbands, certiorari must be granted. The opinion of the Court of Appeals invites zealous prosecutors and capricious judges to rely on it as an instrument of oppression.

This new and unique theory of law can only be corrected by this Court granting certiorari. Until this decision was published, it was universally settled that a waiver of silence in one proceeding did not waive that privilege in any other proceeding as set forth in 58 Am. Jur. *Witnesses,* §99 at page 82 as follows:

> "A person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it *as to the same matter* in a subsequent trial or proceeding. The privilege attaches to the witness in each particular case in which he may be called on to testify, and whether or not he may claim it is to be determined *without reference to what he said when testifying as a witness on some other trial, or on former*

trial of the same case, and without reference to his declarations at some other time or place." [Emphasis supplied].

In *Couch v. United States*, 409 U.S. 322, 34 L.Ed. 2d 548, 93 S.Ct. 611 (1973) this Court reasserted the fundamental premise that the Fifth Amendment privilege is a personal privilege, and that it inheres basically to the person, and not to the information that may incriminate him.

Neither the plaintiff in the civil case or the government in the criminal case could prove a prima facie case without the purchase orders. If Amalie voluntarily produced her records for Henry's inspection, he could then testify to the contents in both the civil and criminal cases. But if Amalie Sneiders did not voluntarily produce the orders, but retained them in her possession, no one could lawfully force her to produce them in either the civil or criminal case. It was, therefore, essential that Amalie Sneiders preserve her rights to remain silent in the civil case to preserve her rights in the criminal case. The trial judge, nevertheless, ignored her rights by ordering her to produce the orders in the civil case. The Court of Appeals, relying solely on conduct of the now deceased Maksis Sneiders, upheld the trial judge.

The Court is reminded that in *Boyd v. United States*, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524 (1886) the court held that the privilege against self incrimination applies to papers in the possession of the person asserting the privilege. Those same facts prevail here. The only copies of the orders in existence are in the possession of the petitioner. *Boyd* was reaffirmed in *Couch* and is still the law today. Petitioner had a right to claim her Constitutional privilege even if she had stolen the documents, since they were in her sole control and custody.

Second Question Presented

This court promulgated rules of Civil Procedure to insure uniform due process in all trial courts. Rule 34 specifically provides the procedural steps by which one litigant may request his opponent to produce documents for copying and inspection. The rule allows the requested litigant thirty (30) days to make a response. That response, if an objection, must set forth the reasons for the objection. If the party seeking the inspection considers the reasons for the objection inadequate, he may invoke the provisions of Rule 37, and move for an order requiring production. That motion must set forth his legal position, and be served and noted for a hearing. This allows the opposite party an opportunity to be heard and to present his legal position before a decision is made. This is due process. Had it been followed by the trial judge, petitioner would not be here today.

The procedures prescribed by this court in Rules 34 and 37 spell out due process. When a trial judge ignores these rules, and issues an oral order *sua sponte* without giving a party an opportunity to be heard, the due process clause of the Fifth Amendment is violated. It seems incredible that the petitioner should be singled out as one who is not entitled to the due process described by the rules. Nevertheless, she was so deprived of that due process and the Court of Appeals affirmed.

Petitioner had a right to expect the trial court to obey the rules prescribed by this court. When the trial court refused, the petitioner had a right to expect the Court of Appeals to reverse. It did not. Petitioner now has a right to expect this court to enforce its rules.

The conduct of the trial court is clearly contrary to the edict of this court in *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S. Ct. 841 (1897). The order of default here was not entered because of any admission based on a refusal to produce, but solely and only as punishment for refusal to obey the *sua sponte* oral order. See Appendix F setting out the order of default. The order clearly is not in aid of the court's processes but solely as punishment. The decision in *Hammond Packing Company v. Arkansas*, 212 U.S. 322, 53 L. Ed. 530, 29 S. Ct. 370, (1909) recognizes this distinction.

Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 2 L.Ed. 2d 1255, 78 S.Ct. 1087 (1958) recognizes that there are constitutional limitations on the power of the courts, even in aid of their own process, and this case falls squarely within those limitations.

Unless this court sanctions a trial court's disregard of due process as set out in the rules of procedure, certiorari must be granted to insure equal justice in all federal courts.

As discussed in more detail in the next section, due process requires among other things, that the issues to be decided be raised by pleadings. *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897) stated in part at 446:

> "There is no distinction in principal between determining a cause upon *issues not raised by the pleadings* in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the plead-

ing containing such defense from the files." [Emphasis supplied].

There were never any pleadings before the trial judge raising any issues relating to production for inspection. The trial judge simply assumed the role of an advocate and ruled, without pleadings, evidence or notice, and in the absence of petitioner.

"Equal justice for all" becomes a mockery if this court permits this unbridled abuse of power to go unchecked. No one can ever be safe from judicial caprice in a federal court if this Court fails to correct the errors here presented.

Third Question Presented

At all relevant times during the pendency of the civil action, petitioner was either under indictment for mail fraud involving exactly the same transactions alleged in the civil suit, or faced the very real threat of reindictment. This undisputed fact entitled petitioner to assert the right to remain silent. See *deAntonio v. Solomon*, 42 FRD 320 (1967) and cases cited therein. This Court has recognized that the Fifth Amendment privilege against self-incrimination is available in a civil case as well as in a criminal case, and the law pertaining thereto is the same. *United States v. Kordel*, 397 U.S. 1, 25 L.Ed. 2d 1, 90 S.Ct. 763 (1970). Due process gave petitioner the right to avail herself of the privilege against self-incrimination in this civil action. Similarly, this Court has recognized that the right to claim one's Fifth Amendment privilege is personal. *Couch v. United States*, 409 U.S. 322, 34 L.Ed. 2d 548, 93 S.Ct. 611 (1973). In view of the fact that: (1) the United States Attorney had merely inspected the Henry purchase orders and had not made any copies, and that (2) the federal investigation was a different proceeding

from the civil action of *Henry v. Sneiders*, the production of records by Maksis Sneiders for inspection by the United States Attorney's staff would not constitute a waiver of petitioner's right to refuse to testify or produce the same physical evidence in any subsequent independent proceeding. See *Glotzbach v. Klavans*, 196 F. Supp. 685 (ED Va. 1961); *Ottomano v. United States*, 468 F.2d 269 (1st Cir. 1972) *cert. den.*, 93 S.Ct. 948 holding "that the waiver of privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding"; *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958) holding that the waiver of the privilege against self-incrimination in making statements to the FBI does not deprive the accused of the right to invoke the privilege in the grand jury hearing; *In re Neff*, 206 F.2d 149 (3d Cir. 1953) holding that a witness who testified "before the grand jury did not thereby waive her right to claim her constitutional privilege against self incrimination as to the same subject matter when called as a witness in the subsequent trial." *United States v. Goodman*, 289 F.2d 256 (4th Cir. 1961) holding, "A waiver of the privilege must occur in the same proceeding in which it is sought to be invoked." *Poretto v. United States*, 196 F.2d 392 (5th Cir. 1952) holding, "the constitutional privilege attaches to the witness in each particular case in which he is called upon to testify, without reference to his declarations at some other time or place or in some other proceeding."

The Fifth Amendment privilege against self-incrimination protects one from being compelled to be a witness against himself. The privilege is not contingent upon privacy or secrecy, but, on the contrary, stands for the proposition that under our system of justice " . . . prosecutors

are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law." *United States v. White*, 322 U.S. 694, 698 (1944).

As a result of petitioner's admittedly "*good faith*" assertion of her Fifth Amendment privilege against self-incrimination, the trial court, on October 19, 1971, entered an order of default finding that, "acts by the Defendants and their counsel constitute a willful obstruction of justice and contempt of Court." Appendix F. The order of default on October 19, 1971, also struck petitioner's answer and she was completely foreclosed from asserting any defense on the issue of liability. As a result she is now deprived of $235,338.89.

This court, as well as text writers, has recognized that there are Constitutional limitations upon the powers of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. In *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed. 2d 1255 (1958) the Court said at page 209:

> "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215, 17 S. Ct. 841, and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 53 L. Ed. 530, 29 S. Ct. 370, 15 Ann. Cas. 645. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

If the decision in the District Court, as affirmed by the Ninth Circuit Court of Appeals, is allowed to stand, then a

party who is either under indictment or threatened with indictment will be forced to make an election between availing himself of the due process clause of the Fifth Amendment, insuring him of a hearing on the merits before his property may be taken, or the Fifth Amendment privilege against self-incrimination protecting him from being forced to be a witness against himself. Failure to grant certiorari will be tantamount to reversing *Garrity v. New Jersey*, 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1967), condemning the duress inherent in a choice between a "rock and whirlpool."

This court has recognized that the due process clause of the Fifth Amendment is an ephemeral concept incapable of precise definition. The often-quoted statement of Daniel Webster probably comes closer than any other in defining the meaning of due process of law:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." *The Trustees of Dartmouth College v. Woodward*, 4 Wheat [U.S.] 518, 4 L. Ed. 629 (1819).

In *Goldberg v. Kelly*, 397 U.S. 254, 267, 25 L. Ed. 2d 287, 299, 90 S. Ct. 1011 (1970), the court said,

> "The fundamental requisite of due process of law is the opportunity to be heard."

And in *Rochin v. California*, 342 U.S. 165, 96 L.Ed. 183, 72 S. Ct. 205, 25 ALR 2d 1396 (1951), this court said at page 172:

> "Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no im-

> mediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 52 L. Ed. 828, 831, 28 S. Ct. 529, 14 Ann. Cas. 560, on a judgment not *ad hoc* and episodic, but duly mindful of reconciling the needs both of continuity and of change in a progressive society."

In *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033 (1912) this court said at page 161:

> "Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

In yet another attempt to describe the meaning and limits of the Constitutional requirement of due process of law, this court in *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 ALR 527 (1932) said at page 68:

> "It never has been doubted by this Court or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. . . . In *Holden v. Hardy*, 169 U.S. 366, 389, 42 L. Ed. 780, 790, 18 S. Ct. 383, the necessity of due notice and an opportunity of being heard is described as among the 'immutable

> principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' and Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L. ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "

This Court has heretofore considered the due process limitation on the imposition of sanctions for failure to make discovery in three cases. In *Hovey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215, 17 S. Ct. 841 (1897), defendant was held in contempt of court, his answer stricken, and a decree pro confesso entered against him because of his refusal to obey an order to pay over a sum of money into the court registry. Justice White, in an exhaustive analysis of the common law power to punish for contempt and of the origins of the due process clause, posed the question at page 413:

> ". . . whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, supress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. *The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer.*" (Emphasis supplied)

The court continued at page 414:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts

> have inherent power to deny *all right to defend an action* and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

The court further noted at page 446:

> "There is no distinction in principal between determining a cause upon *issues not raised by the pleadings in the actual absence of the party,* and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files. [Emphasis supplied]

In the later case of *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas., 645 (1909), this court construed a statute and an order entered pursuant to its provisions to hold that any reasonable showing of an inability to comply with the statute and order would have satisfied the requirements of both, and that Hammond had in fact failed to make such a showing.

The court in the *Hammond* case distinguished *Hovey* in the following terms at page 351:

> "The difference between mere punishment, as illustrated in *Hovey v. Elliott,* and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other.'. . .

An issue in the present case is whether, in a civil action,

the production of potentially incriminating physical evidence may be "lawfully called for" in view of an admittedly "*good faith*" assertion of the Fifth Amendment privilege against self-incrimination. If such production cannot "lawfully be called for" then it would follow that the sanction of entry of default judgment cannot lawfully be imposed without violating the due process clause of the Fifth Amendment.

In *Societe Internationale v. Rogers, supra,* this court found both the *Hovey* and *Hammond* cases to leave open the question whether due process is violated by the striking of a complaint when there has been a "*good faith*" effort to comply with a discovery order. The court noted at 357 U.S. 210:

> "These two decisions leave open the question whether the Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the court in the *Hammond* case might well falter under such circumstances. Cf. *Tot v. United States,* 319 U.S., 463, 87 L.Ed. 1519, 63 S.Ct. 1241. Certainly substantial Constitutional questions are provoked by such action."

While noting the Constitutional questions provoked by such action, this Court avoided a resolution of the due process question by construing FRCP 37 (b) to mean that a failure to comply with a discovery order would not justify a dismissal or default unless such failure afforded a reasonable basis to presume an admission of want of merit in the claim of defense. No such presumption is permissible in the case at hand.

State court decisions, which have considered the Con-

stitutional limitations of due process upon the court's power to punish for contempt have reached the conclusion that the presumption of lack of merit can go no farther than the bounds of the production order involved. In *People v. George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935) the Court said at page 305:

> "The courts can never grant judgment depriving a defendant of his liberty or property unless there has been opportunity to defend the action. Without opportunity to meet a charge, there is no due process of law. *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215. No court can grant such a judgment without a hearing, and a refusal to hear is a denial of due process."

The Washington State Supreme Court in *Mitchell v. Watson*, 58 Wn.2d 206, 361 P.2d 744 (1961) considered this same issue. Watson, a newspaper reporter defendant in a libel action was served with written interrogatories seeking disclosure of the source of information for a story written by defendant. Watson refused to divulge the source and was subsequently held in contempt of court. A default judgment was entered against him. The Supreme Court of the State of Washington reviewed the *Hovey*, *Hammond*, and *Society Internationale* decisions, as well as other state court decisions on the subject, and concluded at page 214:

> "The contumacy of a party disobeying an order of a court may justify his punishment for contempt, but it does not justify the deprivation of his civil rights or the taking of his property and giving it to another."

After analyzing the authorities, the court stated at page 216:

> "(a) A defendant who refuses to make discovery may be adjudged in contempt of court and punished. [cites omitted]

(b) The court may, as 'other consequences, . . . make such orders in regard to the refusal as are just . . .'; but cannot deny to defendant the right to defend the action as 'mere punishment.' Defendant cannot be deprived of a constitutional right.

(c) The purpose of the court's order shall be to balance the rights of the parties so that the contemptor does not profit or benefit from his contemptuous act.

(d) The court may presume and infer, as a matter of law, that the evidence withheld by defendant would, if produced, contradict the contemptor's contentions and support the contentions of plaintiff. The truth of matters thus presumed to be established may result in drastically limiting defendants' proof or in striking all or part of pleaded defenses."

Charles Allen Wright, a noted authority on the Federal Rules of Civil Procedure, in discussing this issue commented in 8 Wright and Miller, *Federal Practice and Procedure*, §2283, pp. 763-64:

"Another aspect of the constitutional problem does not seem to have been discussed in the federal cases though it has arisen occasionally in state litigation. It is illustrated by a state court case in which a newspaper reporter, sued for libel, wilfully refused to answer interrogatories asking the names of his informants, if any, for the article he wrote. It was held error to strike his answer and enter judgment against him for this failure. The court held that defendant could properly be punished for contempt and that the court was free to presume that the reporter had no informant or that the informant did not make the statement in question, but that he could not be denied his day in court on other issues in the case to which the existence of an informant would have no relevance. To go beyond this, and bar the party on issues unrelated to his failure to disclose, cannot be supported on the presumption rationale of *Hammond* and would seem to exceed constitutional limits."

Since federal jurisdiction was based on diversity of citizenship, the law of the State of Washington is controlling. It does not appear that there is any difference in the federal concept of due process and that stated by the Washington Supreme Court in *Mitchell*, but if there is, the Washington law applies. Under *Mitchell* no order of default could be entered.

The petitioner had defenses available which were not related to the purchase orders. By entering an order of default she was denied all rights to defend. This was clearly a denial of due process. Certiorari should be granted.

Respectfully submitted,

VAUGHN E. EVANS
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN R. HENRY, JR.,
Plaintiff-Appellee,
v.
AMALIE SNEIDERS, and AMALIE SNEIDERS, as Personal Representative of the Estate of Maksis Sneiders, Deceased,
Defendant-Appellant.

No. 72-2096

[January 11, 1974]

Appeal from the United States District Court for the Western District of Washington

Before: DUNIWAY and WRIGHT, Circuit Judges, and EAST, District Judge.*

PER CURIAM:

This is an action for fraud and breach of contract arising from the sale of rare stamps through the mail. The plaintiff alleged that the defendants, Amalie Sneiders and Maksis Sneiders, who is now deceased, sold counterfeit stamps, misrepresented by them to be genuine, to the plaintiff. Proceeding under Fed. R. Civ. P. 34, plaintiff sought discovery of certain records concerning the disputed transactions. Following defendant's repeated refusal to produce these records, the district court entered default judgment in favor of the plaintiff pursuant to Fed. R. Civ. P. 37(b)(2).[1] Defendant appeals, and we affirm.

*Of the District of Oregon.

1. If a party . . . fails to obey an order to provide or permit discovery . . . , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . .

"(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

We consider appellant's six assignments of error separately.

1. *Were the defendant's records protected by the privilege against self-incrimination?* After the commencement of this civil action, the appellant and her husband were indicted for mail fraud, the indictment being based in part on the sale of stamps to the plaintiff. The indictment against the defendant was dismissed following the death of her husband, but the dismissal was without prejudice. Since the defendant was subject to criminal prosecution for the transaction at issue in the instant civil case, she claims that records concerning that transaction are protected by the Fifth Amendment privilege against self-incrimination.

The claim is without merit. Under an agreement between the prosecutor and appellant's husband, the records were handed to the postal authorities in connection with the criminal proceedings. Therefore, even if the records were incriminating, their disclosure in the civil case would not have tended to incriminate the defendant. Any incriminating information was already in the hands of the prosecuting authorities.

2. *Was the default judgment greater in amount or different in kind than that prayed for in the complaint?* Fed. R. Civ. P. 54(c) provides that a

> judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

The appellant argues that the judgment was different in kind from that prayed for in that it ran against her personally rather than as a member of the marital community. The plaintiff, however, prayed "for judgment against the defendants *and each of them, and* the marital community composed of them." (Emphasis added.) Therefore, the personal default judgment conformed to the pleadings.

The appellant also argues that the default judgment for $235,338.89 exceeded the $71,243.68 prayed for in the complaint. That part of the prayer, however, was for the amount that the plaintiff had paid to the defendants. In addition, plaintiff prayed for additional damages for breach

of contract, the amount of which was to be proved at trial.[2] The prayer was not limited to $71,243.68, and the default judgment did not exceed the amount prayed for.

3. *Should the district court have granted summary judgment in favor of defendant?* Appellant argues that plaintiff lacked sufficient evidence with which to prove his case and that summary judgment against him should have been awarded. Any insufficiency of the plaintiff's evidence was a direct result of appellant's refusal to comply with a legitimate request for discovery. The assignment of error is, therefore, entirely without merit.

4. *Should the trial judge have been disqualified for prejudice?* Appellant draws our attention to a number of dialogues between the trial judge and appellant's counsel in an effort to show prejudice on the part of the trial judge. The trial judge understandably expressed dissatisfaction and frustration over appellant's repeated refusals to produce the records. But our review of the record reveals that, notwithstanding this understandable frustration, the trial judge was extremely fair to the appellant and her claim of privilege. She was given repeated opportunities to produce the documents and avoid a default judgment, but she continued to refuse.

There is no evidence whatsoever of prejudice or improper conduct on the part of the trial judge.

5. *Was appellant entitled to a jury trial on the issue of damages?* After entering default judgment on the issue of liability, the district court held a hearing to determine the amount of damages. Although appellant had asked for a

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2. Plaintiff prayed as follows:

"By reason of breach of the contract, misrepresentation, and fraud of the Defendants, Plaintiff has suffered a direct loss of the purchase price in the amount of $71,243.68, *together with additional amounts* not yet fully determined for appraisal examination costs, *loss of the value of the stamps as represented*, legal expenses and attorneys' fees, embarrassment, anxiety, and loss of health, the full amounts of which Plaintiff will prove at the time of trial. . . .

"WHEREFORE, Plaintiff prays for judgment against the Defendants *and each of them*, and the marital community composed of them, in the sum of $71,243.68 damages for funds fraudulently procured, *and for Plaintiff's other damages as are proved at the time of trial, together with interest and costs.*" (Emphasis added.)

jury on that issue, the court denied the request and proceeded without a jury.

Fed. R. Civ. P. 55(b)(2) authorizes a district court to hold an evidentiary hearing following a default judgment to determine damages.[3] The Rule preserves the right of trial by jury "when and as required by any statute of the United States." Appellant cites no "statute of the United States" requiring a jury trial under these circumstances. Nor is this court aware of any such statute. Therefore, the Rule does not itself require a jury trial on the issue of damages.

Nor does the appellant have a constitutional right to a jury trial under these circumstances, since the Seventh Amendment right to trial by jury does not survive a default judgment. *Brown v. Van Braam*, 3 U.S. 344 (1797); *Midland Contracting Co. v. Toledo Foundry and Machine Co.*, 154 F. 797 (7th Cir. 1907); *Johnson v. Bridgeport Deoxidized Bronze and Metal Co.*, 125 F. 631 (C.C.D. Conn. 1903); *Raymond v. Danbury & N.R. Co.*, 20 F. Cas. 332 (No. 11,593) (C.C.D. Conn. 1877); *Gill v Stolow*, 18 F.R.D. 508 (S.D.N.Y. 1955), *rev'd on other grounds*, 240 F.2d 699 (2d Cir. 1957); 6 *Moore's Federal Practice* ¶55.07.

6. *Was the appellant denied a fair opportunity to offer evidence on the issue of damages?* Appellant argues that she was precluded from offering evidence at the hearing to determine damages. Although some evidence was excluded, it would have been relevant only as to liability and, since liability was not then an issue, the evidence was properly excluded as irrelevant. Appellant draws our attention to no excluded evidence which was relevant to the issue of damages.

Although she does not explicitly assign it as error, the appellant also argues that the district court made no formal

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3. "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or *to determine the amount of damages* or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and *shall accord a right of trial by jury to the parties when and as required by any statute of the United States.*" Fed. R. Civ. P. 55(b)(2). (Emphasis added.)

order for discovery. Since default under Fed. R. Civ. P. 37(b)(2) is permitted only for refusal to comply with a *court order* for discovery, appellant argues that default was improper. It is true that the district court did not issue a written order directing the appellant to produce the records. It is clear from an examination of the oral proceedings, however, that the district court had orally ordered appellant to produce the records. Where oral proceedings unequivocally give a litigant notice that certain documents are to be produced, the absence of a written order does not preclude the entry of a default judgment for failure to comply. *See Jones v. Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967); *Moore's Federal Practice*, ¶37.03.

Each of appellant's assignments of error is without merit. The judgment of the district court is affirmed.

The mandate will issue at once.

APPENDIX B

FILED

Feb. 19, 1974

U.S. Court of Appeals

DOCKETED

[Superimposed by Rubber Stamp]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN R. HENRY, JR., *Plaintiff-Appellee,* v. AMALIE SNEIDERS, and AMALIE SNEIDERS, as Personal Representative of the Estate of Maksis Sneiders, Deceased, *Defendant-Appellant.*	No. 72-2096 ORDER DC 9813 ATG

Before: DUNIWAY and WRIGHT, Circuit Judges, and EAST, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Duniway and Wright voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED:

APPENDIX C

AMENDMENT [V.]

Capital crimes; double jeopardy; self incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Revised Code of Washington

26.16.030 Community property defined—control of personalty. Property not acquired or owned[,] as prescribed in RCW 26.16.010 and 26.16.020[,] acquired after marriage by either husband or wife or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

APPENDIX E

Revised Code of Washington

62A.2-327 Special incidents of sale on approval and sale or return

(1) Under a sale on approval unless otherwise agreed

(a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) Use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed

(a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(b) the return is at the buyer's risk and expense.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

JOHN R. HENRY, JR., *Plaintiff,* v. MAKSIS SNEIDERS and AMALIE SNEIDERS, *Defendants.*	No. 8913 ORDER OF DEFAULT

THIS MATTER came on regularly before the undersigned Judge sitting in the above entitled Court on August 9, 1971, pursuant to Order for Delivery of Documents or, alternatively, for a Default Judgment in accordance with Order entered July 9, 1971. The Plaintiff was represented by his attorneys, Heckendorn & Judd, C. Henry Heckendorn of counsel, and the Defendant, Amalie Sneiders, personally and as Personal Representative for Maksis Sneiders, deceased, was represented by her attorney, Vaughn E. Evans. The Court inquired whether or not the Defendant, Amalie Sneiders, or her attorney, Vaughn E. Evans, had complied with the foregoing Order of Court dated July 9, 1971, directing them to deliver at once to Plaintiff's attorneys for examination and for copying the originals of all orders for stamps delivered by the Defendants to the Plaintiff and the Court was advised that such orders had not been delivered. The Court thereupon directed the Defendant, Amalie Sneiders, personally and as Personal Representative of the Estate of Maksis Sneiders, deceased, through her attorney, Vaughn E. Evans and also ordered her attorney, Vaughn E. Evans, to deliver copies of all such orders to Plaintiff's counsel at this time. Counsel for Defendants refused and failed to comply with the above Order to Produce orders and with the previous Pre-Trial Orders herein, and gave no justifiable reason for not doing so. The Court finds that acts by the Defendants and their counsel constitute willful obstruction of justice and contempt of Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the pleadings herein of Maksis Sneiders and Amalie Sneiders, his wife, and Amalie Sneiders, individually and as Personal Representative of the Estate of Maksis Sneiders, deceased, be and they are hereby stricken, and said Defendants and each of them be and they are hereby found and declared to be in default and Plaintiff is authorized to present evidence in support of his Complaint herein.

DATED this 19th day of October, 1971.

s/ ALFRED T. GOODWIN
Alfred T. Goodwin
Judge

Presented by:
s/ C. HENRY HECKENDORN
C. Henry Heckendorn
Of counsel for Plaintiff